

No. 13078

United States
Court of Appeals
for the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

NOV 14 1951

PAUL P. O'BRIEN

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the United States District Court, Northern
District of California, Southern Division

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

COMPLAINT FOR DAMAGES — PERSONAL
INJURIES BROUGHT UNDER THE FED-
ERAL EMPLOYERS' LIABILITY ACT
AND THE FEDERAL BOILER INSPEC-
TION ACT

Plaintiff complains of defendant and for cause
of action alleges:

Count I.

That at all times herein mentioned defendant was
and now is a corporation organized and existing
under and by virtue of the laws of the State of
Delaware and doing business in the State of Cali-
fornia and other States; that defendant has its
principal office and does a railroad business in the
City and County of San Francisco, State of Cali-
fornia; that defendant was at all times herein
mentioned, and now is, engaged in the business of
a common carrier by railroad in interstate com-
merce; that at all times herein mentioned plaintiff
was employed by defendant in such interstate com-
merce.

II.

That the action set forth in this count is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Sections 51, et seq., and the Federal Boiler Inspection Act, 45 U.S.C.A., Section 23.

III.

That on or about the 11th day of August, 1950, between the hours of 10 to 11 p.m. thereof, plaintiff was employed by defendant as a student fireman at Roseville, California.

IV.

That at said time and place plaintiff, acting in his capacity as a student fireman, was seated on the fireman's seat of a certain switch engine; that while plaintiff was so seated the operator of said engine injected a stream of oil into the fire box of said locomotive for the purpose of starting the same; that as he injected said oil the fire in said fire box suddenly flashed or flared back into the cab of said locomotive and burned plaintiff so that in order to escape from said fire and further burning, plaintiff jumped from the window of said locomotive to the ground and thereby received the injuries herein-after described. The proximate cause of said injuries was the violation by defendant of the Federal Boiler Inspection Act, 45 U.S.C.A., Section 23, in that the boiler, fire box and appurtenances generally of said locomotive were not in a proper condition to permit said locomotive being operated, and in that said locomotive was unsafe to operate in the

service to which it was put on said occasion, and because said locomotive could not be employed in the active service of defendant without unnecessary peril to life or limb.

Said fire box was in improper condition and unsafe because oil could not be injected into said fire box without flashing back into the cab of said locomotive, where of necessity the fireman and engineer were required to be stationed. Plaintiff's injuries consist of the following:

A compound fracture of the right femur.

A fracture of the tibia and fibula of the right leg.

A complete shattering of the right knee.

A badly bruised and wrenched left knee.

Severe burns of the right hand.

An injury to plaintiff's back, the exact nature of which he does not know at the present time.

V.

That by reason of the premises plaintiff has been damaged in the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00).

Count II.

As and by way of a second cause of action, plaintiff complains and alleges:

I.

Plaintiff repeats herein verbatim the allegations of paragraphs I and III of the first cause of action

herein with the same force and effect as if said allegations were set forth herein verbatim.

II.

That this second cause of action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq.

III.

That at said time and place plaintiff, acting in his capacity as a student fireman, was seated on the fireman's seat of a certain switch engine; that while plaintiff was so seated the operator of said engine injected a stream of oil into the fire box of said locomotive for the purpose of starting the same; that as he injected said oil the fire in said fire box suddenly flashed or flared back into the cab of said locomotive and burned plaintiff so that in order to escape from said fire and further burning, plaintiff jumped from the window of said locomotive to the ground and thereby received the injuries hereinafter described.

That said injuries were proximately caused by the carelessness and negligence of the defendant in that the operator of said locomotive squirted oil into said fire box without first closing the door of said fire box, and by the carelessness and negligence of the defendant in failing to properly clean and maintain said locomotive and its fire box, in that said fire box was permitted to be in such a dirty condition that oil injected into the same would flash back into

the cab of said locomotive. That said injuries consist of the following:

A compound fracture of the right femur.

A fracture of the tibia and fibula of the right leg.

A complete shattering of the right knee.

A badly bruised and wrenched left knee.

Severe burns of the right hand.

An injury to plaintiff's back, the exact nature of which he does not know at the present time.

IV.

That by reason of the premises plaintiff has been damaged in the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00).

Wherefore, plaintiff prays judgment against defendant for the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) and costs of suit herein.

Dated San Francisco, California, October 13, 1950.

RYAN & RYAN,

By /s/ THOS. C. RYAN,

Attorneys for Plaintiff.

[Endorsed]: Filed October 13, 1950.

[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company, a corporation, the defendant above named, and answering the complaint of plaintiff on file herein, and each alleged cause of action thereof, shows as follows:

I.

At all times mentioned in the complaint and herein, defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and was qualified to do business, and doing business in the State of California, and in other states, and was engaged among other activities, in the business of a common carrier by railroad in interstate and intrastate commerce in the State of California, and in other states. In the State of California defendant has a principal place of business in the City and County of San Francisco. On or about the 11th day of August, 1950, between the hours of 10 and 11 o'clock p.m. thereof, plaintiff was employed by defendant as a student fireman at Roseville, California. At said time and place, plaintiff was in a certain switch engine. Thereafter plaintiff suffered certain burns and a fracture of the right leg.

II.

Defendant is without information or belief on the subject sufficient to enable it to answer the allegations of the complaint, and each alleged cause

of action thereof, in respect of plaintiff's conduct or the nature or extent of his injuries. Defendant denies each and every allegation of the complaint, and each alleged cause of action thereof, not hereinabove admitted or denied. Defendant denies the allegations of paragraphs I, II, IV and V of the first alleged cause of action of the complaint and paragraphs I, II, III and IV of the second alleged cause of action of the complaint, save as hereinabove admitted or denied. Defendant denies that plaintiff has been damaged in the sum of \$150,000.00, or any lesser or greater sum, or any sum at all.

And for a Second, Separate and Independent Answer and Defense to the complaint, and to each alleged cause of action thereof, defendant shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If plaintiff were injured in the manner set forth in the complaint, defendant is informed and believes, and upon such ground alleges, that plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said switch engine with the result that he was injured. Said conduct of plaintiff, as aforesaid proximately caused and contributed to the said accident, injuries and damages, if any, alleged by plaintiff.

And for a Third, Separate and Independent Answer and Defense to the complaint, and to each alleged cause of action thereof, defendant shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above and incorporates them herein by reference the same as though fully set forth at length. If plaintiff were injured in the manner set forth in the complaint, defendant is informed and believes, and upon such ground alleges, that plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said locomotive with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that it have judgment for its costs of suit incurred herein; and for such other, further and different relief, as the premises considered, is proper.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1950.

[Title of District Court and Cause.]

DEMAND FOR JURY TRIAL

To Defendant Above Named and to Messrs. Dunne,
Dunne & Phelps, Its Attorneys:

You and Each of You, Will Please Take Notice
that plaintiff hereby demands a trial by jury in the
above-entitled action.

Dated December 14, 1950.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed December 15, 1950.

[Title of District Court and Cause.]

MOTION FOR ORDER PERMITTING DE-
FENDANT TO AMEND ANSWER TO
COMPLAINT

Comes Now, Defendant Southern Pacific Com-
pany, a corporation, the defendant above named,
and moves the above-entitled Court for an order
permitting it to amend the answer to the complaint
in the above-entitled matter, heretofore served and
filed on December 13, 1950, in the following par-
ticulars:

The words "employed by defendant" appearing

on line 29 of page 1 of said answer shall be deleted.

Said motion for an order permitting an amendment to defendant's answer to the complaint is made pursuant to Rule 15, of the Federal Rules of Civil Procedure.

Said motion is based upon all the records, papers, files and proceedings herein, and upon the affidavit of R. Mitchell S. Boyd, filed herewith, a true copy of which is attached hereto.

Dated May 14, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS.

NOTICE OF MOTION

To Plaintiff Above Named and to Messrs. Ryan & Ryan, His Attorneys:

You, and Each of You, Will Please Take Notice That the undersigned will bring the foregoing motion on for hearing before the above-entitled Court, division of the Honorable George B. Harris, a judge of said Court, or such other division of said Court to which this matter may be regularly assigned, in the courtroom of said Court and division, room 276, in the United States Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on Monday,

May 21, 1951, at 10:00 a.m. of said day, or as soon thereafter as counsel can be heard.

Dated May 14, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS.

Memorandum of Authorities

Federal Rules of Civil Procedure, Rule 15.

Respectfully submitted,

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS.

[Title of District Court and Cause.]

AFFIDAVIT OF R. MITCHELL S. BOYD

State of California,

City and County of San Francisco—ss.

R. Mitchell S. Boyd, being first duly sworn, deposes and says:

I am an attorney at law licensed to practice before all the courts of the State of California and the above-entitled court. I am associated in the practice of law with the firm of Dunne, Dunne & Phelps, and one of the attorneys for defendant Southern Pacific Company in the above-entitled action. I am personally familiar with all the records, pleadings and proceedings in the said action and the facts as reported by said defendant.

On Wednesday, May 2, 1951, pursuant to stipulation of counsel, I personally took the deposition of plaintiff in the above-entitled action. The testimony of plaintiff upon the taking of said deposition revealed that plaintiff was not employed by defendant Southern Pacific Company at the time of the accident alleged in the complaint, or, at least, that the question of whether plaintiff was employed by defendant at the time of said accident is, and will be at the trial of said action, a disputed question of law and fact. The facts in said testimony concerning plaintiff's occupational relationship with defendant were not known prior to the taking of said deposition and were not known at the time of the preparation, service and filing of the answer to the complaint in the above-entitled action.

Wherefore, it is respectfully prayed that the motion of defendant Southern Pacific Company be granted.

/s/ R. MITCHELL S. BOYD.

Subscribed and sworn to before me this 14th day of May, 1951.

[Seal] HAZEL E. THOMPSON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT TO
ANSWER TO COMPLAINT

The motion of Southern Pacific Company, a corporation, the defendant above named, for an order permitting an amendment to the answer of said defendant to the complaint in the above-entitled action, came on duly and regularly to be heard before the above-entitled Court, Honorable George B. Harris, the judge of said Court, presiding, on Monday, May, 1951. Plaintiff and the moving defendant appeared by their respective attorneys. The matter was presented to the Court and was argued by counsel for the respective parties and submitted. And now, the matter having been considered by the Court, the Court having been advised, it is

Ordered that the said motion of defendant be, and the same is hereby granted and the defendant Southern Pacific Company is permitted to amend its answer to the complaint on file herein in the following particulars:

The words "employed by defendant" appearing on page 1, line 29, of the answer filed by defendant Southern Pacific Company to the complaint on file herein shall be deleted.

Done in open court, this day of May, 1951.

.....,

A. B. Dunne,

.....,

Dunne, Dunne & Phelps.

.....,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 15, 1951.

—

[Title of District Court and Cause.]

AFFIDAVIT OF DANIEL V. RYAN IN OP-
POSITION TO DEFENDANT'S MOTION
TO AMEND ANSWER

State of California,

City and County of San Francisco—ss.

Daniel V. Ryan, being first duly sworn, deposes and says: That I am an attorney at law licensed to practice before all courts in the State of California and the above-entitled Court in this action; that I am one of the attorneys for the Plaintiff in the above-entitled action; that on Wednesday, May 2, 1951, I was present at the deposition of the Plaintiff in the above-entitled matter; that the testimony of the Plaintiff, upon the taking of said deposition, revealed that Plaintiff was employed by the Defendant as a student fireman at the time of the

accident mentioned in said complaint and was subject to the orders of the Defendant and did work assigned to him by the Defendant, which work was for the benefit of the said Defendant, and further obeyed the orders of said Defendant.

/s/ DANIEL V. RYAN.

Subscribed and sworn to before me this 21st day of May, 1951.

[Seal] /s/ MEREDITH C. BRIDWELL,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Dec. 7, 1953.

[Endorsed]: Filed May 29, 1951.

[Title of District Court and Cause.]

**DENIAL OF MOTION FOR ORDER PERMIT-
TING AMENDMENT TO ANSWER TO
COMPLAINT, WITHOUT PREJUDICE TO
RENEW MOTION AT TIME OF TRIAL**

The motion of Southern Pacific Company, a corporation, the defendant above named, for an order permitting an amendment to the answer of said defendant to the complaint in the above-entitled action, came on duly and regularly to be heard before the above-entitled Court, Honorable Murphy, a judge of said Court, on Monday, May 21, 1951. Plaintiff and the moving defendant appeared by

their respective attorneys. The matter was presented to the Court and was argued by counsel for the respective parties. And now, the matter having been submitted by the Court, the Court having been advised, it is

Ordered that the said motion of defendant be, the same is hereby denied without prejudice to defendant Southern Pacific Company to renew the said motion at the time of trial of the said action.

Dated May 28th, 1951.

/s/ EDWARD P. MURPHY,
Judge United States District
Court.

[Endorsed]: Filed May 28, 1951.

[Title of District Court and Cause.]

MOTION FOR ORDER PERMITTING DE-
FENDANT TO AMEND ANSWER TO
COMPLAINT

Comes Now, Southern Pacific Company, a corporation, the defendant above named, moves the above-entitled court for an order permitting it to amend the answer to the complaint in the above-entitled matter, heretofore served and filed on December 13, 1950, in that the additional defenses of the assumption of risk, injuries and release of defendant from claims for injuries may be added to and set forth in the answer of defendant.

This motion for an order permitting amendment to defendant's answer to the complaint is made pursuant to Rule 15 of the Federal Rules of Civil Procedure.

This motion is based upon all the records, papers, files and proceedings herein, and upon the affidavit of R. Mitchell S. Boyd, filed herewith, true copy of which is attached hereto.

Dated June 20, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

NOTICE OF MOTION

To Plaintiff Above Named and to Messrs. Ryan & Ryan, His Attorneys:

You, and Each of You, Will Please Take Notice That the undersigned will bring the foregoing motion on for hearing before the above-entitled Court, Division of the Honorable Edward P. Murphy, a judge of said Court, or such other Division of said Court to which this matter may be regularly assigned, in the courtroom of said Court and Division, Room 305, in the United States Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on

Monday, June 25, 1951, at 10:00 a.m. of said day or as soon thereafter as counsel can be heard.

Dated June 20, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

MEMORANDUM OF AUTHORITIES

Federal Rules of Civil Procedure, Rule 15.

Respectfully submitted,

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT OF R. MITCHELL S. BOYD

State of California,

City and County of San Francisco—ss.

R. Mitchell S. Boyd, being first duly sworn, deposes and says:

I am an attorney at law, licensed to practice before all the courts of the State of California and the above-entitled Court. I am associated in the practice of law with the firm of Dunne, Dunne & Phelps, and am one of the attorneys for defendant Southern Pacific Company in the above-entitled action.

I am personally familiar with all the records, pleadings and proceedings in the said action and the facts as reported by said defendant.

On Wednesday, May 2, 1951, pursuant to stipulation of counsel, I personally took the deposition of plaintiff in the above-entitled action. Testimony of plaintiff upon the taking of said deposition revealed that plaintiff was not employed by defendant Southern Pacific Company at the time of the accident alleged in the complaint, or, at least, that the question of whether plaintiff was employed by defendant at the time of said accident is, and will be at the trial of said action, a disputed question of law and fact. These facts, first revealed to defendant at the time of taking of the deposition, caused defendant to make a further investigation of the circumstances concerning the accident alleged in the complaint, and, as a result of said investigation, defendant discovered that, because plaintiff was not an employee of defendant at the time of the alleged accident, plaintiff had expressly and impliedly assumed the risk of any injuries sustained while on the premises of defendant and had expressly released defendant from any claims for personal injuries sustained while on said premises. The facts revealed by the testimony in said deposition and the investigation following said deposition concerning plaintiff's occupational relationship with defendant were not known prior to the taking of said deposition and were not known at the time of the preparation, service and filing of the answer to the complaint in the above-entitled action.

Wherefore, it is respectfully prayed that the motion of defendant Southern Pacific Company be granted.

/s/ R. MITCHELL S. BOYD.

Subscribed and sworn to before me this 20th day of June, 1951.

[Seal] HAZEL E. THOMPSON,
Notary Public in and for the City and County of
San Francisco, State of California.

[Title of District Court and Cause.]

ORDER PERMITTING AMENDMENT TO
ANSWER TO COMPLAINT

The motion of Southern Pacific Company, a corporation, the defendant above named, for an order permitting an amendment to the answer of said defendant to the complaint in the above-entitled action, came on duly and regularly to be heard before the above-entitled Court, Honorable Edward P. Murphy, a judge of said court, presiding, on Monday,, 1951. Plaintiff and the moving defendant appeared by their respective attorneys. The matter was presented to the court and was argued by counsel for the respective parties and was submitted. And now, the matter having been considered by the court, the court having been advised, it is

Ordered that the said motion of defendant be, and the same is hereby, granted, and the defendant

Southern Pacific Company is permitted within five (5) days to amend its answer to the complaint on file herein and to set up additional defenses, including assumption of risk of injuries by the plaintiff and release of the defendant by the plaintiff from claims for personal injuries sustained by the plaintiff.

Dated, 1951.

.
U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 20, 1951.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Comes Now, defendant Southern Pacific Company, a corporation, defendant above named, and by leave of Court first obtained, amends its answer herein as follows:

I.

Strikes out the third and fourth sentences of Paragraph I of the first defense, and in place thereof substitutes the following:

On or about the 11th day of August, 1950, between the hours of 10:00 and 11:00 o'clock p.m. on said day, and at the time and on the occasion of the accident referred to in the complaint, plaintiff was on the premises of defendant Southern Pacific Company as a student fireman, at Roseville,

California, agreeably to the provisions of "application for permission to observe operations of locomotives, cars and trains," a copy of which is hereto attached, and at a time and place selected by him for his own convenience and solely for his own benefit and convenience. At the time and on the occasion referred to in the complaint, plaintiff had permission to be with and observe fire lighters, and at the time and on the occasion of his injury was on the engine, as this defendant is informed and believes and therefore avers, solely for the purpose of observing the movement of said engine, and not in the service of this defendant, and was not performing any services for this defendant.

II.

Adds an additional defense as follows:

For a Fourth and Separate Defense defendant shows:

I.

Incorporates by reference the averments of paragraph I, as amended, of the first defense. Plaintiff was injured as a result, and solely as a result, of a risk assumed by him.

Wherefore, defendant prays as in its answer on file.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

Application for Permission to Observe Operations
of Locomotives, Cars and Trains

Whereas, I, the undersigned, Roger M. Libbey, residing at Citrus Heights in the State of California, and being 27 years of age, have applied to Southern Pacific Company for permission to enter and ride upon the locomotives, trains and cars of said Company for the purpose of observing the operations of the railroad of said Company with the understanding that I shall be under no obligation to perform any work or service upon said railroad until employed by said Company, and that neither said Company nor I shall be under any obligation with respect to my entering the employ of said Company at any time, and

Whereas, said Company is willing to grant my request upon the understanding above expressed, subject to the further condition that I assume all risks of injury which may be sustained by me while upon the premises of said Company or while riding its locomotives, cars or trains,

Now, Therefore, in consideration of said Company granting my said request, I do hereby assume all risks of injury which may be sustained by me while upon or about the property or premises of said Company, and I hereby release and discharge said Company, and the officers and employees thereof, from any and all claims, demands, suits and liabilities of any kind for death or for any injury that I may sustain while upon or about said property or premises.

Signed at Sacramento, State of California, this
9th day of August, 1950.

/s/ ROGER NORMAN LIBBEY.

Witness:

/s/ M. PALMITER.

[Endorsed]: Filed July 9, 1951.

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY
DEFENDANT

The defendant, for whom the undersigned attorneys appear, requests the Court to give the within instructions, and hereby moves that the same be given on submission of the above-entitled cause to the jury herein.

Dated July 9, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant.

DEFENSE INSTRUCTION No. 22

Even if plaintiff is considered as having been employed by the defendant when he went upon the defendant's premises as a student fireman because he performed service for the defendant, still if you find that under the instructions of the foreman in charge the plaintiff on the shift on which the accident happened was instructed to accompany the fire lighters and learn to light fires and for his own

benefit and convenience and in his own interest and without any instructions from defendant, and not for the purpose of performing any service for the defendant, deviated from the line of activity designated for him on his shift and went upon the locomotive, he then departed from the course and scope of any employment, and if he was injured while he was so in the course of departure, your verdict must be in favor of defendant Southern Pacific Company.

C. & O. Ry. Co. v. Harmon's Adm'r,
173 Ky. 1, 189 SW 1135.

DEFENSE INSTRUCTION No. 23

If you find that in going upon the locomotive the plaintiff did so either on the instructions or at the request of Hostler Petersen, and Petersen did not request him to do so because of any emergency or to perform any service, but solely in order that plaintiff, for his own benefit, might observe the operation of the locomotive, then I instruct you that such direction or request or invitation from Petersen could not and did not obviate or modify or set aside any earlier and contrary instructions, if any, or any other instructions as to what plaintiff should do, given to plaintiff by the foreman in charge, and any such direction or invitation from Petersen was not an instruction to perform service on behalf of the defendant.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

ADDITIONAL INSTRUCTION GIVEN BY
DEFENDANT

To the Jury:

In response to your inquiry reading: "Are we to take into consideration the fact that false statements were made on the application for employment in determining the settlement," the Court replies as follows: The defense interposed by the defendant based upon alleged false statements made in the application for employment goes to the question of the liability of the defendant. It has no relationship to the matter of damages in the event the jury should decide for the plaintiff.

Approved:

A. B. DUNNE,
Attorney for Defendant.

RYAN & RYAN,
By THOS. C. RYAN,
Attorney for Plaintiff.

[Endorsed]: Filed July 11, 1951.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Fifty Thousand (\$50,000.00) Dollars.

/s/ JACK H. DONNER,
Foreman.

Filed 7-11-51, at 6 o'clock and 7 minutes p.m.

By /s/ EDWARD C. EVENSEN,
Deputy Clerk.

[Endorsed]: Filed July 11, 1951.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

JUDGMENT ON VERDICT

This case having come on regularly for trial on July 9, 1951, before the Court and a Jury of twelve persons duly impaneled and sworn to try

the issues joined herein; Thomas Ryan, Esq., and Daniel Ryan, Esq., appearing as attorneys for the plaintiff, and Arthur Dunne, Esq., appearing as attorney for the defendant, and the trial having been proceeded with on the 9th, 10th, and 11th days of July in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following verdict, which was ordered recorded, viz: "We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of Fifty Thousand Dollars (\$50,000.00). Jack H. Donner, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant the sum of Fifty Thousand Dollars (\$50,000.00), together with his costs herein expended taxed at \$74.60.

Dated July 12, 1951.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket July 12, 1951.

[Endorsed]: Filed July 12, 1951.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named and to His Attorneys:

You Are Hereby Notified that on Monday, the 23rd day of July, 1951, at the hour of 10 o'clock a.m. on said day, or as soon thereafter as counsel can be heard, or at such other time as the Court by order may fix, defendant Southern Pacific Company, by its attorneys, will move the above-entitled Court, Department of the Honorable Louis E. Goodman, in the courtroom of said Court and Department in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

To enter judgment herein in favor of defendant Southern Pacific Company, a corporation, notwithstanding the verdict of the jury herein. Said motion will be made upon the following grounds and each of them:

1. This is an action under the Federal Employers' Liability Act, and there is no evidence that plaintiff herein was an employee of this moving defendant.

2. This is an action under the Federal Employers' Liability Act, and there is no evidence that the plaintiff herein was engaged in interstate commerce within the meaning of this Act, or that any part of any duty of plaintiff was in furtherance of inter-

state or foreign commerce or in any way or directly or closely or substantially affected such commerce.

3. That at the time he was injured plaintiff had departed from the course of any assumed employment with this defendant and was not acting in the course or scope of any assumed employment and had departed from directions given to him as to what he should do on or about the premises and equipment of defendant.

And further said Motion will be made upon the ground that at the conclusion of all the testimony in the case defendant made a motion that a verdict in its favor be directed by the Court, upon the grounds aforesaid, which motion should have been granted but was not granted.

II.

To vacate and set aside the judgment and verdict herein and grant to this moving defendant a new trial upon the following grounds and each of them:

1. Each of the grounds above specified in support of the motion for judgment notwithstanding the verdict.

2. The verdict is excessive as matter of fact and as matter of law, and as to the amount thereof is not sustained by the evidence, and was given and appears to have been given under the influence of passion and prejudice.

3. The Court erred in its rulings on evidence and in the exclusion of evidence offered by defend-

ant, as more particularly appears from the reporter's transcript of the proceedings of the trial.

4. The Court erred in its instructions to the jury and in the refusal to give instructions requested by defendant, to which refusal defendant duly objected and excepted as more particularly appears from the reporter's transcript of the proceedings upon the trial.

III.

Said motions will be made upon this Notice of Motion, upon all the records, papers and files herein, and upon the transcript of record, by the Court Reporter, of all of the proceedings upon the trial of this cause.

Dated July 17, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant,
Southern Pacific Company.

Receipt of copy acknowledged.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

Upon consideration of the arguments on motion for new trial and after review of the record, I am convinced that the evidence shows that plaintiff was an employee of defendant and that he had not departed from the course of his employment at the time of his injury.

In my opinion, the defense of fraudulent representation in obtaining employment, proximately relating to the injury, was not sustained.

The verdict was for \$50,000 damages. Here again, as in *Southern Pacific Co. v. Guthrie*, 186 F.2d 926, (9 Cir. 1951) cert. denied 341 U.S. 904 (1951), the claim of excessiveness of the verdict is tendered. The verdict was for a larger amount than I would have awarded. But, like *Guthrie*, neither the evidence nor the size of the verdict justifies setting it aside or directing a remittitur.

The motion for a new trial is denied.

Dated July 31, 1951.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 2, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, defendant in the above-entitled action, deeming itself aggrieved by the judgment in the above-entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of July 11, 1951, herein, and the judgment stamped filed on the 12th day of July, 1951, and entered on July 12, 1951, in Volume VI of the Book of Judgments at page 365 thereof in the office of the Clerk of the above-entitled District Court.

Dated August 3rd, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant and Appellant, Southern
Pacific Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 3, 1951.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT

For the reasons stated in the Court's order denying defendant's motion for new trial, the defendant's motion for judgment notwithstanding the verdict is denied.

Dated August 3, 1951.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 6, 1951.

[Title of District Court and Cause.]

SUPPLEMENTAL NOTICE OF APPEAL

Southern Pacific Company, a corporation, the defendant above named, having filed herein, on August 3, 1951, and after denial by the above-entitled Court on July 31, 1951, of its motion for new trial and after denial by said Court on August 3, 1951, of its motion for judgment notwithstanding the verdict, its Notice of Appeal from the judgment in the above action in favor of plaintiff above named and it appearing from the records of the Clerk of the above-entitled Court that said order of August 3, 1951, denying Southern Pacific Company's judgment for motion notwithstanding the verdict was stamped filed on August 6, 1951,

Now Therefore notice is hereby given that Southern Pacific Company, a corporation, defendant in the above-entitled action, deeming itself aggrieved by the judgment in the above-entitled action, does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from said judgment and from the whole thereof. The judgment from which said appeal is so taken is the judgment on the verdict of July 11, 1951, herein, and the judgment stamped filed on the 12th day of July, 1951, and entered on July 12, 1951, in Volume VI of the Book of Judgments at page 365 thereof in the office of the Clerk of the above-entitled District Court.

Dated August 10, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant and Appellant, Southern
Pacific Company, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 10, 1951.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, Southern Pacific Company, a corporation, defendant in the above-entitled action, is about to, or intends to, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action in the

above-named District Court of the United States on the 12th day of July, 1951, in favor of Roger N. Libbey, plaintiff, and against Southern Pacific Company, a corporation, defendant, for the sum of Fifty Thousand Dollars (\$50,000.00) and costs of suit, and from the whole of said judgment; and

Whereas, said appellant is desirous of staying execution of said judgment so to be appealed from;

Now, Therefore, Indemnity Insurance Company of North America, a corporation duly incorporated under the laws of the State of Pennsylvania, for the purpose of making, guaranteeing, and becoming surety on bonds and undertakings and having complied with all of the requirements of the State of California respecting such corporations, does hereby, in consideration of the premises, undertake and promise, and does hereby acknowledge itself bound, in the sum of Sixty Thousand Dollars (\$60,000), being in excess of the whole amount of the judgment, costs on appeal, interest, and damages for delay, that if the said judgment appealed from, or any part thereof, be affirmed or modified or if the appeal be dismissed, the appellant will pay and satisfy in full the amount directed to be paid by the said judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all costs, interest and damages which may be awarded against the appellant upon said appeal, and that if appellant does not make such payment within thirty (30) days after the filing of the remittitur from the United States Court of Appeals for the Ninth Circuit, or from such other

court as may and shall lawfully issue the remittitur in the Court from which the appeal is taken, viz., in the United States District Court for the Northern District of California, Southern Division, judgment may be entered in said action on motion of Respondent, Roger N. Libbey, and without notice to said Indemnity Insurance Company of North America, a corporation, in his favor against the undersigned surety for such amount, together with interest that may be due thereon and the damages and costs which may be awarded against said appellant upon such appeal.

In Witness Whereof, the said Indemnity Insurance Company of North America, a corporation, has caused this obligation to be signed by its duly authorized attorney-in-fact and its corporate seal to be thereunto affixed at San Francisco, California, this 3rd day of August, 1951.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

By /s/ RICHARD W. CATLETT,
Its Attorney-in-Fact.

Approved:

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form August 3, 1951.

RYAN & RYAN,

By /s/ DANIEL V. RYAN,
Attorneys for Plaintiff.

State of California,

City and County of San Francisco—ss.

On this 3rd day of August in the year one thousand nine hundred and fifty-one, before me, Anna A. Ainslie, a Notary Public in and for the City and County of San Francisco, personally appeared Richard W. Catlett, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he subscribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] /s/ ANNA A. AINSLIE,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed August 3, 1951.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated between the parties to the above action through their respective counsel that the supersedeas bond filed herein by Southern

Pacific Company, defendant in the above-entitled action, and appellant to the United States Court of Appeals for the Ninth Circuit from the judgment in said action, on August 3, 1951, is sufficient in form and as to time of filing for the purpose of complying with Rule 62(d) and Rule 73 of the Federal Rules of Civil Procedure and for the purpose of perfecting the appeal of Southern Pacific Company from the judgment in said action.

Dated August 17, 1951.

/s/ A. B. DUNNE,

DUNNE, DUNNE & PHELPS,
Attorneys for Defendant and
Appellant.

/s/ DANIEL V. RYAN,

RYAN & RYAN,
Attorneys for Plaintiff.

So Ordered, August 20th, 1951.

/s/ LOUIS E. GOODMAN,
Judge, U. S. District Court.

[Endorsed]: Filed August 20, 1951.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 30085

ROGER N. LIBBEY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

Before: Hon. Louis E. Goodman.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

RYAN & RYAN, by
THOMAS C. RYAN, ESQ., and
DANIEL V. RYAN, ESQ.

For the Defendant:

DUNNE, DUNNE & PHELPS, by
ARTHUR B. DUNNE, ESQ.

(A jury being duly impaneled and sworn, the following proceedings were had.)

Monday, July 9, 1951, at 2 P.M.

(Opening statements of both counsel reported but not transcribed.)

(During the presentation of the opening statement by Mr. Ryan a photograph, marked Plaintiff's Exhibit 1, was introduced and filed in evidence.)

Mr. Ryan: Mr. Libbey, will you take the stand?

ROGER NORMAN LIBBEY

plaintiff herein, called as a witness in his own behalf, sworn.

The Clerk: Please state your full name to the Court and to the jury?

A. Roger Norman Libbey.

Direct Examination

By Mr. Ryan:

Q. Where do you live, Mr. Libbey?

A. At 7904 Auburn Boulevard, Citrus Heights, California.

Q. And where is Citrus Heights located?

A. It is about a mile and a half on 99 Highway toward Sacramento from Roseville.

Q. A suburb of Roseville? A. Yes, sir.

Q. All right. Now, are you married or single?

A. I am married, sir.

Q. Is that your wife here in the courtroom? [2*]

A. Yes, sir.

Q. Have you a family?

Mr. Dunne: That is objected to as immaterial.

Mr. Ryan: Your Honor, I submit that in all these questions on the question of instructions, your Honor instructs the jury all the time regarding

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Roger Norman Libbey.)

mental suffering and worry, and I believe he has to take care of his family as part of the damages.

Mr. Dunne: We are not responsible for that part of it.

Mr. Ryan: I submit——

The Court: What do you want the witness to tell us, if he has any children?

Mr. Ryan: Yes.

The Court: I will allow him to answer, but I shall tell the jury, of course, they don't make awards for damages on the basis of whether a man has one child or ten children.

Mr. Ryan: That's right.

The Court: If it is offered for the purpose of affecting or engaging the jury's sympathy, they must disregard it.

The Witness: Yes, sir, one baby.

Mr. Ryan: Yes.

The Witness: Boy.

Q. (By Mr. Ryan): What is your age, Mr. Libbey? A. 27.

Q. What is your birth date? [3]

A. August 24, 1923.

Q. What was the date of your accident that you are now suing for?

A. August 11, 1950, about 10:30 at night.

Q. Then I take it you were just a few days short of your 27th birthday at the time of the accident, is that correct? A. Yes, sir.

Q. All right. Now, what was the nature of your employment at the time of your accident?

(Testimony of Roger Norman Libbey.)

Mr. Dunne: That is objected to as calling for a conclusion.

The Court: What is the nature?

Mr. Dunne: Nature of your employment. I have no objection to the facts, but I do object to the conclusion.

The Court: Ask him what he was doing at the time.

Q. (By Mr. Ryan): What were you doing at the time of your accident?

A. I was a fire—student fireman.

Q. Student fireman, and by whom were you employed? A. Southern Pacific——

Mr. Dunne: Objected as calling for a conclusion.

The Court: Why don't you avoid the legal technicalities, Mr. Ryan, by asking him to state what took place?

Mr. Ryan: All right.

Q. Let me ask you this: when and where did you first attempt to get a job from the Southern Pacific Company? [4]

A. At the yard office in Roseville.

Q. And what was the date? A. Ninth.

Q. August the 9th? A. Yes, sir.

Q. All right. When you went to the yard office in Roseville on August the 9th, did you speak to anyone connected with the Southern Pacific?

A. I believe his name was Lonergan, the fellow——

Q. Lonergan, L-o-n-e-r-g-a-n? All right. Did you

(Testimony of Roger Norman Libbey.)

tell Mr. Lonergan that you wanted to get a job as a fireman for the Southern Pacific Company?

A. Yes, sir.

Q. All right. When you told that to Mr. Lonergan, what, if anything, did he say to you?

A. He asked me if I was a veteran and if I was married.

Q. He asked you if you were a veteran and what did you tell him in that regard?

A. I told him yes. In other words, he wanted to know if I was of draft age and I told him no, I had already served.

Q. I see. When you told him you were a veteran and that you were married what did he do then or say?

A. He give me a slip of paper to go to Sacramento.

Q. I see. And did you turn that paper in to the man at Sacramento? [5]

A. Yes, sir.

Q. You haven't got that now?

A. No, sir, I haven't.

Q. Do you remember what the paper that Mr. Lonergan gave you to give to the man at Sacramento said?

A. Just to receive me and I was to take a physical examination.

Q. Take a physical examination?

A. Yes, sir.

Q. Did you take a physical examination?

A. Yes, sir, in Sacramento.

Q. And let me take this seriatum. When you

(Testimony of Roger Norman Libbey.)

took that paper to Sacramento—when did you do that, what date?

A. I believe it was the 10th, in the morning, because I went to work at 3:59 shift in the afternoon.

Q. The next day, then? A. Yes, sir.

Q. Then you took this paper to Sacramento?

A. Yes, sir.

Q. And where did you take it in Sacramento?

A. I took it to the main office up above in the station there, S. P. station.

Q. An office at the S. P. station in Sacramento?

A. Yes, sir.

Q. All right. When you went there you were by yourself or were you a member of a group of men? [6]

A. There was a number of young firemen being hired, being hired then.

Q. A number of—

Mr. Dunne: I move to strike that out.

The Court: Yes, that part about being hired will go out. You went with a group of those who wanted to be firemen, is that it?

The Witness: Yes, sir.

Q. (By Mr. Ryan): How many, approximately, were in the group?

A. Oh, about five or six, something like that.

Q. All right. Now, did you hand that paper that Mr. Lonergan gave in Roseville to anyone in Sacramento?

(Testimony of Roger Norman Libbey.)

A. Yes. I don't remember their name. I filled out a paper.

Q. Pardon me? A. I filled out a paper.

Q. Well, who gave you the paper that you filled out?

A. They asked you your past unemployment.

The Court: He wants to know did you go to some office up there on the top floor?

The Witness: Yes, sir.

The Court: What did it say on the door or office?

The Witness: Employment office.

The Court: Someone behind the counter gave you a paper to fill out?

The Witness: Yes, sir. [7]

The Court: Do you know the name of that person?

The Witness: No, I don't. It was a lady.

Q. (By Mr. Ryan): It was what?

A. It was a lady.

Q. A lady? A. Yes, sir.

Q. All right. Now, have you got a copy of that paper she gave you to fill out?

A. No, sir, they kept it.

Q. They kept it?

A. They didn't give me no duplicate copy.

Q. Do you know what questions were asked in that paper and what answers you gave?

A. My age and name and past record for the past ten years and things like that.

(Testimony of Roger Norman Libbey.)

Q. You mean your work record for the past ten years?

A. Yes, age, name, married or single, just the general principles of getting a job.

Q. I see. Is that all? A. Yes.

Q. All right. When you filled in that paper who did you give it to?

A. The lady kept it and then she sent me over for a physical examination.

Q. Now, where did she send you for a physical examination? [8]

A. I don't remember that, sir.

Q. But where did you go for your physical examination? A. In Sacramento.

The Court: Some doctor's office?

The Witness: Yes.

Q. (By Mr. Ryan): Do you remember the name of the doctor?

A. No, sir, I don't. It has been a year ago.

Q. But it was a doctor's office in Sacramento, separate and apart from the Southern Pacific Company depot, is that right? A. Yes, sir.

Q. Now, did you go to that doctor's office by yourself or with others?

A. There was several other fellows there, but I don't know whether firemen or not. I was by myself.

Q. You were by yourself? A. Yes, sir.

Q. All right. When did you go to this doctor's office?

(Testimony of Roger Norman Libbey.)

A. It was just in the afternoon, about one o'clock on the 10th.

Q. I see, and is that several hours after you had been to the other office? A. Yes, sir.

Q. How long after?

A. Maybe an hour and a half, something like that.

Q. All right. Now, did this doctor give you a physical examination? [9] A. Yes, sir.

Q. Please tell us what he did?

A. He examined my legs and arms.

Q. Were you stripped? A. Yes, sir.

Q. Completely stripped? A. Yes, sir.

Q. All right. Now, he examined your legs and arms, is that right? A. Yes, sir.

Q. Now, let me ask you this: To come right to this point—did you have your left leg injured in the war? A. Yes, sir.

Q. All right. Did the injuries that you received in the war leave scars on your left leg?

A. Yes, sir.

Q. Would you please show us the scars, if you could? I think this is important to bring this out now.

(Witness pulling up pants leg and exhibiting scars.)

Q. (By Mr. Ryan): As far as you can.

A. Didn't show any more.

Q. Now—can your Honor see it? Is that a scar on the outside of your left leg? A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. That you got in your war wounds? [10]

A. Yes, sir.

Q. All right. And is this long scar here one connected with the war wound? A. Yes, sir.

Q. What is this scar from?

A. Where they had to go in and take pieces of bone out and split—cut it open and spread it apart.

Q. That was a surgical scar? A. Yes, sir.

Q. And what made this big scar on the side of your leg (indicating)?

A. A small piece went in here and come out over here (indicating).

Q. Small piece of what?

A. Come out here.

Q. Inside your leg? You have a scar that is partly visible, your pants hide it?

A. Yes, sir; it goes up higher.

Q. How long, approximately, is that scar?

A. Oh, about one and a half inches, two inches, something like that.

Q. About one and a half inches showing here (indicating). Is this where you say a piece of shrapnel went in here and came out the other side?

A. Yes, sir. [11]

Q. Did that break the bone? A. Yes, sir.

Q. Now, when you were having your physical examination in Sacramento did the Doctor ask you how you got those scars on your left leg?

A. Yes, sir.

Q. What did you tell the doctor? Please tell the jury.

(Testimony of Roger Norman Libbey.)

A. I told him how it happened. He asked me.

Q. No, you tell us what you told him, the words, as closely as you can remember.

A. He asked me what island I served on.

Q. Did you tell him?

A. Served on Guadalcanal.

Q. You served on Guadalcanal?

A. From August 7, 1942, until October, 1943, is when I got my leg.

Q. You got that injury in October, 1943?

A. While sniping up. [12]

Q. What?

A. While hunting a sniper. He asked me and I told him how it happened.

Q. What happened that you got your leg smashed, specifically?

A. Well, all of a sudden a couple of 81's started cutting loose and couldn't get up to get them.

Q. This is what I mean: Where did the shrapnel come from that went through your leg?

A. Exploded in the air close to us.

Q. By mortar? A. Yes, sir.

Q. All right. Now, did you tell that to the doctor? A. Yes, sir.

Q. Did you tell the doctor where the shrapnel went through the thigh bone?

A. He didn't ask me that question.

Q. Did you tell him about how you were treated and how they fixed that up?

A. That is all he asked me, just how it happened; didn't ask me any more that I remember of.

(Testimony of Roger Norman Libbey.)

Q. All right. Did he ask you as to how long you were under medical care for that injury?

A. I don't believe he did. I can't remember.

Q. Now, when you went to this doctor in Sacramento did anybody from the Southern Pacific Company give you a card or a [13] letter to deliver to the doctor, or a piece of paper, or anything like that?

A. I believe they did; they give me an envelope, sealed, to take to the doctor.

Q. Yes?

A. I believe he give me a sealed envelope to take back and to the station.

Q. Pardon me?

A. I believe the doctor give me a sealed envelope to take back to the station.

Q. How long did that physical examination take up there at Sacramento?

A. Just a regular routine examination, approximately, about half an hour, or more.

Q. Did he examine your heart and your lungs——

A. Yes, sir.

Q. ——and your eyes?

A. Everything.

Q. At that time when this doctor examined you, did you have any other scars than these scars on your left leg?

A. Oh, a scar on my head.

Q. Is that the scar right here, indicating on the forehead in the hair line?

A. Yes, sir.

Q. What was it from, shrapnel? [14]

A. Yes, sir.

Q. From Guadalcanal?

A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. Did he say he wanted you to tell him about that?

A. I don't remember, it has been so long. He asked me about my leg, I remember that much. I don't think he asked me about my head.

Q. Did you have any other scar on your cheek?

A. Yes, sir.

Q. Was that also from shrapnel?

A. Yes, sir.

Q. And did you tell him about that?

A. I don't think he asked me, only about my leg.

Q. Only about your leg?

A. Only about my legs.

Q. Let me ask you this: After this half hour did that doctor give you anything to take to anyone?

A. I think he gave me an envelope to take back to the station.

Q. All right, when he gave you the envelope what did you do with it?

A. I gave it to the station master. I don't remember his name, right there in Sacramento.

Q. You went back to the main office of the Southern Pacific Company in Sacramento?

A. Yes, sir. [15]

Q. You handed that to the station master?

A. Yes, sir.

Q. What did he say when you handed it to him?

A. Told us to wait around, wanted to give us a lecture on rules and regulations.

Q. Did you wait around for awhile?

(Testimony of Roger Norman Libbey.)

A. Yes, sir, I was—a number of fellows was there, quite a few fellows.

Q. Quite a few fellows. All right. And then finally did someone come and give you a lecture, as you have expressed it? A. Yes, sir.

Q. Who was the man that gave you the lecture?

A. I don't remember his name.

Q. All right. And what did he tell you in regard to the job of being a student fireman, if anything?

A. He told us quite a bit of regulations, just a few of them, you know, about being extremely careful.

Q. Yes?

A. Like not getting on and off a running train, like when—you be sure you don't slip on the tank, just a lot of different things, can't remember—you got a book of regulations here, haven't you?

Q. Gave you several books of rules and regulations, is that correct? A. Yes, sir. [16]

Q. Now, what, if anything, did he tell you in regard to what your duties were when you went to work?

Mr. Dunne: That is objected to as leading and suggestive, calling for a conclusion; no objection to letting the witness tell what happened.

Mr. Ryan: That is what I am trying to get at, but I want to direct his attention to what I am getting——

The Court: Overruled, he may answer.

The Witness: Will you repeat that?

(Question read by the Reporter.)

(Testimony of Roger Norman Libbey.)

A. I was to be a student fireman for two weeks. Then if I qualified I would go on regular pay list.

Q. (By Mr. Ryan): I see. All right. Now, did he tell you where you were supposed to work, what city?

A. Yes, I was supposed to work in the roundhouse at Roseville.

Q. All right. Did he tell you what you were supposed to do when you got to the roundhouse in Roseville?

A. No, he told me to report back to, I believe it was Lonergan, I believe that is his name.

Q. Then did you report back to Lonergan?

A. Yes, sir.

Q. And what did Lonergan tell you?

A. He told me to report to Tim Farrell.

Q. Tim Farrell? A. The foreman. [17]

Q. And did you report to Tim Farrell?

A. Yes, sir.

Q. And what time was it that you reported to Tim Farrell?

A. It was 3:59 on August 10th, 1950.

Q. Now, all this happened on this one day, happened in Sacramento, going to Roseville and going to the roundhouse? A. Yes.

Q. Who was Tim Farrell?

A. Roundhouse foreman. He was the swing shift foreman.

Q. All right. Now, did Lonergan give you any paper or document to hand to Farrell?

A. He gave me two sheets of paper to sign at

(Testimony of Roger Norman Libbey.)

the end of each shift. I signed one of them. I was hurt before I could sign the other one.

Q. Do you know what Lonergan's position is? If you don't know, don't attempt, but if you do know, tell us? A. I don't know, sir.

Q. All right. Now, you say you reported to Tim Farrell, the roundhouse foreman, at 3:59 p.m. on August 10; is that correct? A. Yes, sir.

Q. Now, what, if anything, did Tim Farrell tell you when you reported to him?

A. He told me to keep my eyes and ears open and learn everything I could about being a [18] fireman.

Q. All right. Did he assign you to anyone to show you what you were supposed to do?

A. Well, he told me to, if I could, follow these fire lighters. They were Spanish fellows, and couldn't—hard to understand their language, but I stayed pretty close to them.

Q. To follow the fire lighters?

A. Yes, sir.

Q. You say there were two of them?

A. Yes, Tony and Bob. I don't know their last names.

Q. Tony and Bob. All right. Now, did you follow Tony and Bob around that first day?

A. Yes, sir.

Q. And what did Tony and Bob do?

A. They lit fires, and they lit engines and built up steam.

(Testimony of Roger Norman Libbey.)

Q. Now, when you say Tony and Bob lit fire, did they have to get on board locomotives to do that? A. Yes, they did.

Q. And would you follow them into the cab of the locomotive? A. Yes, sir.

Q. And were these locomotives locomotives that had a fire in them or that were cold?

A. Some were cold and some weren't; some had up a little steam and some didn't.

Q. How would they light the fires?

A. Well, to light a fire first you check your [19] steam, see how much steam pressure is up. Of course, I am a student, I didn't learn much about it.

Q. I understand that, Mr. Libbey.

The Court: What he wants you to say, what did you observe them doing, what did you see them doing?

Q. (By Mr. Ryan): What did you see them doing?

A. I saw them get oil in the fire box, and they light waste, they light it, and have their blower and atomizer adjusted just so, have to have so much water, so much water in the—the water injector, if you inject so much water from the steam—I didn't have much time to learn.

Q. But where would they put this waste material to start the fire?

A. They throw it in the part where—in the fire-box, open the firebox door.

Q. All right, and did they just throw that in, or have a pole to poke into the firebox?

(Testimony of Roger Norman Libbey.)

A. They lit it and tossed——

Q. Pardon me?

A. They lit it and tossed it with their hand.

Q. They lit the waste? A. Yes, sir.

Q. What would the waste be on?

A. They light one end of the waste, and the firebox door would be open and they heave it in. [20]

Q. Would they light it in their hands?

A. Waste has a little bit of oil on it and doesn't go too fast, light one end of it and have the firebox door open and heave it in there.

Q. All right. Now, how many locomotives did they light the fire on that way on that first day?

A. Oh, let's see.

Q. Approximately, roughly?

A. Oh, eleven or twelve, something like that.

Q. All right. Did you light any of them yourself that first day? A. No.

Q. Did you have any further conversations with the roundhouse foreman, Tim Farrell, other than the one he told you to keep your eyes and ears open and learn all you could about firing?

A. Well, at the end of the first shift he signed that one paper. We didn't have any conversations, just signed it. I can't remember him saying anything to me.

Q. I show you a document which is entitled, "Authority to pass and instruct student," and then down below it seems to be the signature of an A. F. Farrell. Is that the document he signed at the end of your first day's work? A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Mr. Ryan: I offer this in evidence, your Honor, as next [21] exhibit.

The Clerk: Plaintiff's Exhibit 2, introduced and filed in evidence.

(Whereupon the document above referred to, marked plaintiff's Exhibit 2, was received in evidence.)

Mr. Ryan: I would like to read that; it isn't very long, your Honor.

The Court: Very well.

Mr. Ryan: Title of this paper is "Authority to Pass and Instruct Student."

"Mr. Roger N. Libbey. Occupation, fireman. August 10, 1950."

And then in printing is the following:

"Please see that, student, is thoroughly instructed in the duties of the position named and impress upon him the importance of thoroughly acquainting himself not only with the duties of that position but of any other with which he may be entrusted or to which he may aspire. The necessity for carefulness, courtesy, reliability, loyalty and honesty should be pointed out, as well as the advantages that will accrue from his getting along pleasantly with his fellow workers. At conclusion of student trips with you, please fill out and sign the following report and forward it to my office." [22]

(Testimony of Roger Norman Libbey.)

And then there is a line and title; it is not signed. Then underneath is a form with blocks that are filled in. It says:

“Date, 9/10—”

I suppose they mean 8/10, but it is down here as “9/10, from three to eleven.” Then it says:

“Engine or train, date from . . . to”—it says:

“Opinion as to fitness for position.”

And under that it says:

“Learning.”

And it is signed A. F. Farrell.

Q. Now, did you come to work the next day, August 11, the day of your accident?

A. Yes, sir.

Q. All right. And what shift were you on that day?

A. Same shift.

Q. That is 7:59—I mean 3:59 p.m. to 11:59 p.m.?

A. Yes, sir.

Q. Now, when you came to work on the second day, August 11, did you report to Mr. Farrell again?

A. Yes, sir.

Q. Did you have to present any slip to him this time?

A. No.

Q. All right. When you reported to Farrell on the second day did he say anything to you, or did you just go to work?

A. I just started to work. [23]

Q. All right. Were the same two fire lighters, Tony and Bob, working there that day, too?

(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. Did you follow them around that day?

A. Yes, sir.

Q. And what time did the accident happen, by the way? A. About 10:30.

Q. About 10:30 p.m.?

A. Not approximately, right around there some time.

Q. All right. Say from four o'clock in the afternoon up until 9 o'clock at night, let us take that period, how many fires and how many locomotives did they light?

A. Oh, approximately about the same as the day before.

Q. That is eleven or twelve?

A. About that.

Q. Now, on this second day, did you light any fires? A. I lit some, yes, sir.

Q. How many fires did you light?

A. About two.

Q. All right. Now, let us get down to the time of your accident. Immediately prior to getting on the locomotive upon which you got hurt, what were you doing?

A. They finished lighting all the fires and everything. The fire lighters told me just to stand around and watch and pick up whatever you can learn, can't help you anymore, we have [24] lit all the fires and the engines are ready.

Mr. Ryan: I didn't get that. May I have it read?

(Testimony of Roger Norman Libbey.)

The Court: Very well.

(Record read.)

Q. (By Mr. Ryan): All right. Now, what happened after that time?

A. I was standing in the corner just looking around, you know, noticing things. Peterson came along.

Q. Who is Mr. Peterson?

A. He was a hostler there.

Q. A hostler. Do you know Peterson?

A. Yes, sir.

Q. What is his first name?

A. I believe it is Don. I never really knew. I always called him Pete.

Q. Mr. Peterson came along and what did he say to you?

A. He was going to move an engine, asked me if I liked to go with him.

Q. Now, where was this engine he was going to move, where was it located?

A. Didn't you say in one? (To Mr. Dunne:) I heard him say it was——

Mr. Dunne: That is right, I did say in one. Don't take it from me, I am not sure.

The Witness: I don't remember. I was hurt so bad and it [25] was dark, I didn't know the place too well.

Mr. Ryan: I didn't get all this.

The Court: He said it was dark and he didn't know the place. You mean you didn't know which roundhouse it was, is that it?

(Testimony of Roger Norman Libbey.)

The Witness: I didn't know which stall. I believe it was stall one, I don't know for sure.

Mr. Ryan: I see.

The Court: Was it in the roundhouse?

The Witness: Was in the roundhouse.

Q. (By Mr. Ryan): Now, those engines that are in the roundhouse, are they in individual stalls?

A. They all have their place, yes.

Q. Yes. And was the engine with the front end of it in towards the roundhouse? A. Yes.

Q. Wall——

A. It was inside the roundhouse.

Q. Were there pits underneath them?

A. Yes.

Q. All right. So we all understand this, do you know how many locomotives that roundhouse will hold? A. I don't.

Q. It is a very long building, with a lot of tracks leading up alongside to a wall, is that right? [26]

A. Yes, sir.

Q. And then when they back out they back out to a round table? A. Turntable.

Q. A turntable, and then you turn the table around and shoot it off whatever track you want to. How far is it, say, from the rear of the tender of the engine you got on back to the turntable?

A. Thirty-five, forty feet, something like that.

Q. Very short distance?

A. It was just a short ways back there.

Q. Now, when Peterson said he was going to move the engine and he said do you want to go with

(Testimony of Roger Norman Libbey.)

me, did he say anything else about what you should do? A. Not that I remember of.

Q. All right. Now, did you and Peterson both get on this particular engine? A. Yes.

Q. And where did Peterson go?

A. Well, he was going to be the engineer, the hostler—I mean, he was going to move it.

Q. Did he sit down any place?

A. He sat down in the engineer's seat and I sat down on the fireman's seat.

Q. Now, the engineer sits down on the right-hand side as you [27] look forward to the front of the engine? A. Yes.

Q. And the fireman's seat is on the left-hand side as you look forward? A. Yes, sir.

Q. Let me ask you this: Did you do anything during the movement of that locomotive?

A. No, sir, I never touched nothing.

Q. You touched nothing? A. No.

Q. Were you in a position to see what was going on? A. Yes, sir.

Q. Were you trying to learn about the movements of the locomotive?

A. Yes, sir, I was watching him.

Q. You were watching Peterson. All right. Now, what did Peterson do when he sat down on the engineer's seat box?

A. He started it in a backward position, started to go backwards.

Q. Yes? A. Moved the engine backwards.

Q. Did he move any throttles or levers?

(Testimony of Roger Norman Libbey.)

A. I believe the throttle was already set at a——

Q. Did he move any levers or anything of that sort, or did you see that? [28]

A. Well, he moved the—I don't know the things, I mean, nothing about engines very much.

Q. All right.

A. The lever that makes you go backwards, pull it towards you, I learned that much, have to pull it towards you to go backwards.

Q. When he pulled that lever, did the engine begin moving? A. Yes, sir.

Q. All right. Now, please tell his Honor and the Jury what happened then when the thing started moving?

A. Well, there was a tremendous amount of fire, the firebox door was open toward the fireman, and a tremendous amount of fire shot out, started burning my hand and wrist and caught my shirt on fire, my hair started to get on fire, I had, I jumped out, the fire had me blocked to go out the back way, the way you get out of the—the right way to get out.

Q. You say the fire had the way you would normally go out by the ladder, that was blocked off by the fire?

A. Yes, the fire come out like this (indicating) and some of the flames come up in my face and had my shirt on fire. It was pretty hot.

Q. And did you actually get burned?

A. Yes, sir.

Q. And were you treated for burns?

A. Yes, sir. [29]

(Testimony of Roger Norman Libbey.)

Q. All right, and where were you burned?

A. On my arm and knuckles there, still got the scar.

Q. Have you got scars from those burns?

A. Yes, sir.

Q. Will you please stand up so that I might follow this? I think I should take you down a little bit. Careful.

(Witness in front of the jury box.)

Q. (By Mr. Ryan): That white scar you see, is that part of the burns you got that day?

A. Yes, sir.

Q. Step down this way. That white scar, is that it? Is that correct? A. Yes, sir.

Q. Now, you say you also had some burns—for the record, that is the right forearm. Now, did you have any other burns besides that one?

A. Knuckles——

Q. Have you got scars on that?

A. Yes, sir, in here.

Q. You mean this place where the skin is glazed and white?

A. Right in here (indicating the knuckles).

Q. Right in here, one point?

A. Along the knuckles. The whole hand was burned——

Q. The Reporter has to get this down and he didn't hear you. Will you say that again? [30]

A. Well, I was burned here and here (indicating), my whole arm was burned, but not what you

(Testimony of Roger Norman Libbey.)

call bad, didn't leave any scars like it did here and here.

Q. When you say here and here,—

A. That is on my knuckles.

Q. You're describing your knuckles of your right hand? A. My wrist.

Q. And the wrist?

A. Yes. The skin come off the whole hand, but didn't leave scars.

Q. The skin came off the whole hand?

A. You know how skin peels off when it is burned.

Q. Your right hand? A. Yes, sir.

Q. All the skin of your right hand came off?

A. You know how it peels off. It came off.

Q. Will you sit down? And you say your shirt was burned, is that correct? A. Yes, sir.

Q. And what part of your shirt was burned?

A. Well, up around here, around my chest.

Q. Around your chest? A. My arm.

Q. Indicating your right arm?

A. Yes, sir. [31]

Q. You said something about your hair?

A. My hair was singed. My wife came to see me at the hospital. I didn't know my hair was singed. I lost a lot of blood and pretty sick. I know when I came to just before I went in surgery she said, "Gee, your hair is burned." [31-A]

Q. Now, what did you do when this wall of fire along the fire—whatever you want to call it, blocked

(Testimony of Roger Norman Libbey.)

off your—blocked the way from going down the ladder; what did you do then?

A. I had to jump out or burn up. It was pretty hot.

Q. Was this fire all over the cab or just on your side?

A. Just on my side, because the fire door was open, just propped open with a sand scoop.

Q. Let me ask you about that. I show you Plaintiff's Exhibit No. 1, is that the type of fire door it was?

A. Is that the consolidated type, isn't it?

Q. Now, is that the type that it was?

A. Yes, sir.

Q. Now, are these levers that are shown in the picture, is that on the fireman's side of the engine?

A. Yes, sir.

Q. All right; and is this thing the handle of the door?

A. Yes, sir.

Q. And when you open the door, does the open part of the door go towards the engineer or the fireman?

A. Well, the door opens this way (indicating), from the left to the right. In other words, the fire could—couldn't come out his way very easy.

Q. All right.

Mr. Ryan: Your Honor, I would like to pass this to the [32] jury, if I may.

The Court: All right.

(Whereupon counsel passed photographs to the jury.)

(Testimony of Roger Norman Libbey.)

Mr. Ryan: And if it is all right, I will keep on asking him questions.

Q. Now, you say that the way the fire door was open the fire couldn't go over to the engineer's side, is that right?

A. It was propped open about this far with the sand scoop.

Q. Let's see——

A. About like that, something (indicating).

Q. About four or five, five—four or five inches, would you say?

A. Yes, sir, towards me, it opens towards the left, opens this way (indicating).

Q. You say there was also something holding the door open? A. A sand scoop.

Q. And what kind of an object is a sand scoop, what is that like?

A. It is kind of like a scoop, you know, with a back like this you scoop up—you have seen a scoop.

Q. About how big is that scoop?

A. About this big (indicating).

Q. You're indicating about eight inches, maybe?

A. Maybe a little bit longer.

Q. Eight inches or more longer. You say that was propped [33] in to keep the door open?

A. Yes, sir.

Q. All right. So when the fire came out it just came over in your direction, is that correct?

A. Yes, sir.

Q. When did you discover that about the door being open?

(Testimony of Roger Norman Libbey.)

A. I noticed it was open, but I didn't pay any attention to it, because I figured it was supposed to be that way.

Q. Did anyone ever tell you that the door was not supposed to be open? A. No, sir.

Q. No one gave you any instructions one way or the other on that? A. No, sir.

Q. All right. Now, I show you a picture of what appears to be the interior of a locomotive with a sort of a cushion seat a person could sit down on with a foot and back rest behind it and certain levers and a window right next to the seat and an arm rest. Is that a correct and fair representation of the seatbox and the window on the fireman's side of the kind of engine you were on that night?

A. Yes, sir.

Mr. Ryan: I will offer that, your Honor, as our next exhibit.

Mr. Dunne: No objection. I assume it is offered for the [34] purposes of illustration?

Mr. Ryan: Yes, your Honor, my main purpose is to show what the window looks like.

The Clerk: Plaintiff's Exhibit 3 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit 3, was received in evidence.)

Q. (By Mr. Ryan): And then I show you a picture taken from the outside looking at a window

(Testimony of Roger Norman Libbey.)

and does that look, appear to be the type of window that was on the engine that you were hurt on?

A. Yes, sir.

Mr. Ryan: I offer that as our next exhibit, your Honor, and I would like to show those two, if I may, to the jury.

The Court: All right.

The Clerk: Plaintiff's Exhibit 4 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit 4, was introduced and filed in evidence.)

Q. (By Mr. Ryan): Mr. Libbey, how did you go out the window?

A. Well, its kind a hard to remember, it happened so fast, but——

Q. Well, I mean, could you tell us whether you went out feet first? A. Feet first. [35]

Q. Did you climb over the seat and put your legs out?

A. I just made a jump out. I wasn't—I could show you, if I could do it, if I had two good legs to show you, I can't tell you, I just jumped.

Q. You moved so fast?

A. I moved so fast, coming fast, your mind is working as fast as your feet, sometimes, as your actions does.

Q. All right. Where did you land?

A. On the concrete below.

Q. On the concrete below. Do you know what the

(Testimony of Roger Norman Libbey.)

distance is or could you give us an estimate of the distance from the sill of the window to the concrete floor below?

A. I can make a rough guess, I don't know whether it would be right or not.

Q. All right, what is your estimate?

A. I would say eleven and a half to twelve feet, something like that.

Q. And what happened to you when you landed, how did you land, do you know that?

A. I landed with most of my weight on the right leg.

Q. Most of the weight on the right leg.

A. I went backward, laid on my back, my leg folded up at the same time. My leg was in a position like this, (indicating)—it was bent as far as it would go and the femur bone was sticking out about that far, a little over an inch. [36]

Q. It was sticking—were you wearing overalls?

A. No, I was wearing Levis.

Q. You were wearing Levis, and was the bone sticking out making a hole in the Levis?

A. It just barely punctured, but I could tell by the pain, by feeling it.

Q. Right around a few inches above the knee?

A. Right here (indicating).

Q. I see. And what happened then after you fell? Did you lose consciousness?

A. No. First, my leg busted, I didn't notice it until after I was on my—flat on my back, I looked—first my back hit after my leg folded up, back

(Testimony of Roger Norman Libbey.)

of my head hit, flat on my back, I laid there and my leg was in a collapsed position. I tried to pull it back, and then the pain started coming, a dead feeling. I noticed my leg was busted, I could see where the bone had pierced, broken kind of backward, I felt it pierced the pants a little bit and with the blood it was getting pretty wet, the blood was coming, starting to run.

Q. And who was the first one to come to your assistance?

A. Peterson came right away. He was about, one of the first fellows to come there.

Q. I see. How far, if at all, had the engine moved, after you fell?

A. Just a—maybe a couple of feet. He stopped right there [37] and got out. I didn't know he was standing there, because the pain was starting to come.

Q. Now, were you removed to a hospital?

A. I was taken to a little first aid station there and had to call a doctor. They took me, carried me over on a stretcher. It was maybe—they took me to a truck in a stretcher.

Q. Yes.

A. Maybe it was about four or five blocks, something like that, to the first aid station. They took me out of the stretcher when the doctor came and took me in there and put my leg in a splint, straightened it out and gave me a morphine shot and he told me to hold your breath. It was bent like, so he pulled it out and straightened it out.

(Testimony of Roger Norman Libbey.)

Q. Your right leg?

A. Yes, and put it in the splint.

Q. Let me ask you this: How was your left leg before this accident?

A. Well, it——

Q. Were you able to work with it?

A. Yes, I held down jobs.

Q. All right, what job did you have immediately before going to work for the Southern Pacific Company?

A. I worked at McClellan Field.

Q. That is McClellan Field, airfield, Army airfield near Sacramento? [38]

A. Yes, sir.

Q. What did you do at the McClellan Field?

A. I was a mechanic's helper.

Q. Yes, and how long did you act as a mechanic's helper at McClellan Field?

A. May I refer to my notes? I wrote down the date of my deposition and I wrote down—and I can't remember them in my mind very good. Is that all right?

Q. I will ask you that question later. I want to get a point before recess. Let me ask you this: For instance, before this accident, how far could you walk?

A. I could walk five or six or seven miles on the other leg and think nothing of it.

Q. And you actually——

A. I had at times. I had an automobile, but I used to take off walking just for the practice, sometimes.

(Testimony of Roger Norman Libbey.)

of my head hit, flat on my back, I laid there and my leg was in a collapsed position. I tried to pull it back, and then the pain started coming, a dead feeling. I noticed my leg was busted, I could see where the bone had pierced, broken kind of backward, I felt it pierced the pants a little bit and with the blood it was getting pretty wet, the blood was coming, starting to run.

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A. I could walk five or six or seven miles on the other leg and think nothing of it.

Q. And you actually——

A. I had at times. I had an automobile, but I used to take off walking just for the practice, sometimes.

(Testimony of Roger Norman Libbey.)

Q. Your left leg was in such a condition you *could* five, six or seven miles? A. Yes.

Mr. Ryan: Your Honor going to take the recess, now?

The Court: We will take the midafternoon recess for ten minutes at this time.

(Short recess.) [39]

Q. (By Mr. Ryan): Mr. Libbey, you called my attention to something during the recess, so I will refer back a moment to that physical examination you got from the Southern Pacific doctor in Sacramento. Do you remember that? A. Yes, sir.

Q. All right. Now in addition to telling him how you got your war wound and showing it to him, can you state whether or not you told him anything in regard to any disability rating that you were getting?

A. I told him I got a disability, yes.

Q. And were you getting a disability rating from the Veterans Administration at that time?

A. Yes, sir.

Q. And how much was that?

A. Ten per cent then.

Q. Did you tell that to the doctor?

A. Yes, sir.

Q. All right. Now before the recess, also, I was going into the type of work you did before going to work for the Southern Pacific Company. Now you told us it was August 9th, 1950, that you made application for a job as a fireman with the S. P.

(Testimony of Roger Norman Libbey.)

What was the last day you worked for McClellan Field as a mechanic's helper?

A. I believe it was in August, August 8th.

Q. August 8th. All right. Now, how long did you work as a [40] mechanic's helper for McClellan Field?

A. I went to work the last part of February of 1950.

Q. Did you work continuously from the last part of February, 1950, up to August 8th, 1950?

A. Yes, sir.

Q. That's a little over five months, is that correct?

A. Yes, sir.

Q. All right. Now, what kind of duties did you do as a mechanic's helper at McClellan Field?

A. I would overhaul Pratt & Whitney engines and Wright Cyclones——

Q. Pratt & Whitney airplane engines?

A. Yes.

Q. And what else?

A. Allison and Curtiss-Wright engines.

Q. Yes; and was that light work or was it heavy physical work?

A. It took quite a bit of strength. You had to stand up all the time, just about, and——

Q. And how many hours a day did you work?

A. Eight hours.

Q. Most of it standing up?

A. Yes, sir.

Q. Handling wrenches?

A. Yes, sir. [41]

Q. Heavy wrenches?

A. Yes, sir.

Q. All right. Now, what did you do—strike that.

(Testimony of Roger Norman Libbey.)

I will put it this way. How far did you get in school?

A. I went to the second year of high school.

Q. Where did you go to high school?

A. Near Fair Oaks, California.

Q. That is, Fair Oaks, up near Sacramento, in Sacramento County? A. Yes, sir.

Q. Not far from Roseville?

A. Yes, sir. The high school is San Juan, was the name of it.

Q. You went up there two years, went through two years of high school? A. Yes, sir.

Q. Did you ever graduate from high school?

A. No, sir.

Q. Did you ever have a job as a clerk in your whole life? A. No, sir.

Q. Did you ever study accounting or clerking?

A. No, sir.

Q. What did you do after finishing—did you finish the second year of high?

A. No, sir, I didn't finish all that year. [42]

Q. What did you do; where did you go from high school?

A. I joined the marine corps in 1941.

Q. What was the date that you joined the marine corps? A. December.

Q. December what? A. 12th.

Q. December 12th, 1941; how old were you at that time?

A. I believe I was just eighteen years old.

(Testimony of Roger Norman Libbey.)

Q. All right. Now did you go right from the middle of your second year of high school into the marine corps? A. Yes, sir.

Q. All right. Now how long were you in the marine corps? A. Up until August 18, 1945.

Q. Were you discharged from the marine corps on or about that date, August 18th, '45?

A. Yes, sir.

Q. All right, and what kind of a discharge did you get? A. M.D.—medical discharge.

Q. A medical discharge. At the time of your discharge from the marine corps on August 18th, 1945, were you able to get around without the aid of crutches, or were you still using crutches?

A. I walked on crutches for a little while, then I threw them away.

Q. All right. Now what is the first job you got after getting [43] out of the marine corps?

A. On January, 1946, I went in the Army Transportation Corps under Merchant Marine, what it was.

Q. The Army Transportation Corps; you mean from Fort Mason?

A. Pedro then was our shipping out base.

Q. Was that the United States Army Transport—

A. Well, they had two transportation bases, but I shipped out of Pedro first.

Q. By "Pedro" you mean San Pedro, California? A. Yes, San Pedro, California.

Q. All right. Now what ship did you go out on?

(Testimony of Roger Norman Libbey.)

A. The Sea Barb.

Q. The Sea what?

A. The first one was the Charles A. Stadford, first ship.

Q. Well, let me put it this way. I am not so much interested in the name of the ship; how long were you in the United States Army Transport Service?

A. Up until 1947. May I refer to some notes here?

Mr. Ryan: May he, your Honor? He has a bad memory, and he made some notes.

The Witness: I have the dates on these.

The Court: All right.

Q. (By Mr. Ryan): From your notes, then, please give us the dates that you were in the army, the U. S. Army Transport Service. [44]

A. January, 1946, until the latter part of '47.

Q. The latter part, all right. Now, what job did you hold on board these ships?

A. I was a wiper in the engine room.

Q. Now a wiper in the engine room?

A. Then I was a deck crewman, ordinary seaman.

Q. Ordinary seaman in the deck department.

A. Yes, sir.

Q. All right. Now, what were your duties, generally speaking, as a wiper in the engine room?

A. I worked, I cleaned floor plates and painted boilers and things like that. Didn't monkey with no mechanical works of any kind.

(Testimony of Roger Norman Libbey.)

Q. And as a wiper, can you state whether or not you were required to get into cramped spaces?

A. Yes, sir, we had to paint the deck, floor plates and such as that.

Q. Floor plates behind machinery in the engine room? A. Yes, sir.

Q. All right. And then, you say part of the time was as an ordinary seaman. What were your duties there?

A. I would chip paint and secure stores, stow away lines and all kinds of things.

Q. All right. Say, incidentally, did you hurt that left leg again while you were in the army transport service? [45] A. Yes, sir.

Q. And where was that? Where did that occur?

A. I had a small storm off on Inchon, Korea, and I fell from one deck to the next.

Q. When was that?

A. In September — pardon me; in August of 1946.

Q. Of August, 1946. And what injury did you suffer to the left leg?

A. I fractured my knee joint.

Q. Fractured your knee joint?

A. Yes, sir.

Q. And were you hospitalized for that?

A. Yes, sir, I went to the 29th Field Hospital, just out of Seoul, Korea.

Q. That is a United States army hospital near Seoul, Korea?

(Testimony of Roger Norman Libbey.)

A. Yes; it was a Korean, but they made it into an American hospital.

Q. It was an American hospital with American doctors, is that right?

A. American nurses and doctors, yes.

Q. All right, and how long were you in that hospital in Korea?

A. Oh, let's see. I left there in the latter part of '46.

Q. And was your leg in a cast?

A. They took me out of the cast just before I come home. [46]

Q. All right. And did you recover from that injury? A. Yes, sir.

Q. All right, and after you recovered from that injury did you continue working up until the latter part of '47 for the army transport service?

A. Yes.

Q. Now after that knee injury, what job did you hold with the army transport service?

A. I still hold my ordinary seaman's and my wiper's, but I worked out of Fort Mason up until the latter part of that year, down there.

Q. And what type of work did you do at Fort Mason? That is here in San Francisco?

A. Yes.

Q. What type of work did you do there?

A. Oh, I helped unload stores on trucks and supplies and stuff like that.

Q. Doing sort of stevedoring work?

A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. All right. Or packing things on board ship?

A. Yes.

Q. Were these heavy crates that you would carry?

A. Yes. We used to load them into nets, and they would hoist them up on the crane into the hold.

Q. Were you able to do that work? [47]

A. Yes, sir.

Q. All right. Now after leaving the army transport service in the latter part of 1947, what was the next job you held?

A. Well, in March I worked for Sacramento Box. I was a laborer, handling lumber.

Q. For Sacramento who?

A. Sacramento Box, in Sacramento.

Q. All right.

A. (Continuing): I worked there March and April of 1948.

Q. And you say you were a laborer?

A. Yes.

Q. What type of work were you required to do there?

A. Handling lumber, loading and unloading box-cars, trucks and things like that.

Q. More or less stevedoring work again?

A. Yes.

Q. I see. And then what did you do?

A. Then I went to a logging camp and pulled green chain, handled green lumber up there.

Q. Where was this lumber company?

A. Pino Grande, above Placerville.

(Testimony of Roger Norman Libbey.)

A. Yes; it was a Korean, but they made it into an American hospital.

Q. It was an American hospital with American doctors, is that right?

A. American nurses and doctors, yes.

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Q. Where was this lumber company?

A. Pino Grande, above Placerville.

(Testimony of Roger Norman Libbey.)

Q. What is the name of the place?

A. Pino Grande. It is above Placerville. It is a logging camp up there.

Q. And was that laboring work? [48]

A. Yes, sir.

Q. Incidentally, were you hired as a laborer?

A. Yes, sir.

Q. All right, and what did you have to do as a laborer up there?

A. We would handle the green chain.

Q. What? A. Handle green lumber.

Q. Handle green lumber; please tell us what you mean by the term "handling green lumber"; what did you do with it?

A. There is a chain there of lumber of different grades, and you have to take a different size of board and put it in its pile and put a different size in the other pile. It is all green lumber, just after it comes off the saw. It is already cut.

Q. Was this a sawmill? A. Yes.

Q. Oh, I see. And how long did you work at that? A. Let's see. April until June.

Q. April until June of 1947? A. 1948.

Q. What? A. 1948—April until June.

Q. All right. Now without going into all the details, from June 1948, up until the time you went to work for McClellan [49] Field, which was in February of 1950, what did you do in the meantime?

A. Well I—you want the job after I left the last one, don't you?

(Testimony of Roger Norman Libbey.)

Q. No, I don't want the name of each company you worked for, but I mean, please tell us the type of work you did?

A. Just labor work, such as lumber work, saw-mills.

Q. Sawmills. Any other?

A. Sometimes digging ditches when I could get a job.

Q. Digging ditches? A. Stuff like that.

Q. Did you do that very long?

A. Well, there's one place here I worked several months. I worked for a mortuary outfit.

Q. Well, I mean, about digging ditches; how long did you do that?

A. Oh, approximately about three months.

Q. And was that with a pick and shovel?

A. Yes, sir.

Q. Eight hours a day? A. Yes, sir.

Q. And would your left leg, the one that you had the war wound in, would that permit you to carry on that work?

A. No, I used to shovel with it; I mean, I used it for a shovel leg. [50]

Q. I mean, you were able to work even though you had that shell wound? A. Yes, sir.

Q. I see, all right.

My brother said to clarify that work for the mortuary. Is it true that the mortuary job was where you were digging ditches where they were going to build a building?

(Testimony of Roger Norman Libbey.)

A. Yes. No, I wasn't going to build a graveyard; they were just going to build a new place.

Q. All right. Thanks. All right now, let me ask you this. How much money did you earn when you worked for the transport service?

A. About \$300 a month. We got mine bonuses over the 108th Meridian. They paid mine bonuses in different waters we was in.

Q. How much—what was your basic rate of pay or what would it have been had you not been injured as a fireman, locomotive fireman, for the Southern Pacific?

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial and purely speculative.

Mr. Ryan: I submit to Your Honor that if he hadn't had this accident, presumably he would have been a fireman.

Mr. Dunne: There is no such assumption.

The Court: It is speculative, though. That would require guessing at that. [51]

Mr. Ryan: You mean about his base rate of pay, so much an hour?

The Court: Well, it still would be speculative, because that wasn't what he was doing at the time.

The Witness: I couldn't answer it anyway, because I don't know.

The Court: Well, that solves the question.

Q. (By Mr. Ryan): Getting back a moment to when Peterson told you he was going to take out this locomotive, what was your purpose in getting on that locomotive?

(Testimony of Roger Norman Libbey.)

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial. Well, I will withdraw the objection; no objection.

A. Well, I figured I could learn something I hadn't learned before.

Q. (By Mr. Ryan): You figured you could learn something about what?

A. About locomotives. I mean, not only my firing, but operating it.

The Court: Well, it is pretty obvious, isn't it, Mr. Ryan?

Mr. Ryan: All right.

Q. (By Mr. Ryan): Now let me ask you this. Were you moved to a hospital in Sacramento?

A. Yes, sir. [52]

Q. What hospital were you moved to?

A. Mercy Hospital.

Q. And how long were you there?

A. I was removed the next day about noon time.

Q. That would be October 12, 1950?

Mr. Dunne: August.

Q. (By Mr. Ryan): I mean August 12th?

A. August 12th.

Q. Thanks. All right. Now, what treatment, if any, did they give you at the Mercy Hospital in Sacramento?

A. Well, they give me some blood plasma.

Q. Blood plasma?

A. And some more morphine. Then they knocked me out and put a body cast on, set my leg and put it in the body cast.

(Testimony of Roger Norman Libbey.)

Q. All of that was done at the Mercy Hospital?

A. Yes, sir, that night.

Q. Yes. And was that a plaster of paris cast that was put on you? A. Yes, sir.

Q. What portion of your body did it cover?

A. Well, my left leg from the knee to the hip, clear across, and covered this whole leg, foot and all (indicating). A spy cast is what they call it.

Q. Up to your stomach? A. Yes, sir. [53]

Q. All right. Now you say the next day you were moved, and where were you moved to?

A. The Southern Pacific Hospital here in Frisco.

Q. The Southern Pacific General Hospital in San Francisco? A. Yes, sir.

Q. All right. Now how long were you at the Southern Pacific General Hospital on the first occasion?

A. Up until October 16th, I think was the date.

Q. October 16th. Now what was done for you when you first got to the Southern Pacific Hospital here?

A. Well, first I was given some more blood.

Q. More blood?

A. Yes. And then they set my right arm, which they thought was fractured. It was swollen pretty bad. They doctored the burns and set my right arm in, not a splint, but just—I guess they call it a splint, just to keep it there until they x-rayed it and found out if it was busted, if it was fractured, which it wasn't.

(Testimony of Roger Norman Libbey.)

Q. You say they treated the burns; how did they treat the burns?

A. Just put salve on my right hand.

Q. And what do they do—did they leave that cast on that they put on at the Mercy Hospital, or did they take that off?

A. Well, I don't remember it exactly. I think it was about the 14th, the date, that they knocked me out again and put me [54] in traction. They removed the cast.

Q. They removed the cast? A. Yes, sir.

Q. And when you say they put you in traction, what did they do?

A. Well, they put a pin through my leg here (indicating).

Q. A pin through your leg?

A. Swung up over an iron contraption and had weights in the back. In other words, they was trying to stretch my leg, pull it in place. That's the only way they set it; they didn't operate it, just pulled it in place until the bones snapped in place, and then put me in a cast.

Q. That pin; was that put through the bone below your knee or above your knee?

A. Below, below my knee.

Q. And did they put, not chains but wires to that?

A. Yes, they had kind of an affair there, I guess—it hooked on the side with wires, a cable attached to it, running——.

(Testimony of Roger Norman Libbey.)

Q. Do you know how much weight they had on this traction?

A. Approximately about thirty-five to thirty-eight pounds, something like that.

Q. Now how long were you in traction?

A. About seven and a half weeks.

Q. And during that seven and a half weeks were you continuously in traction? A. Yes. [55]

Q. They never took off the weights?

A. They couldn't, because the leg would jump back out of place.

Q. When you say the leg was out of place, was there any bowing to it?

A. Now you are asking me some questions, sir, I can't answer, except it was all broke to pieces and they wanted to stretch it back in place. They couldn't operate because I had infection. I had a big hole where the femur bone went through, and it was infected. They had to swab it out every day until it healed.

Q. And——

A. (Continuing): And they couldn't operate.

Q. How long did they have to do that?

A. Pardon?

Q. How long did they have to swab it out every day?

A. They was still doctoring it after I come back home from there in the wheel chair. They took it out of the cast. Well, they doctored up until even

(Testimony of Roger Norman Libbey.)

after the cast was on. They had a little hole cut in the side where they would swab it out every day.

Q. When did they put a cast on at the Southern Pacific Hospital? A. Let's see.

Q. Well, I don't mean the date, but that was after they were through with the traction?

A. After about, eight weeks later, after traction about. [56]

Q. I see. After about seven and a half weeks of traction, then a second cast was put on you; is that correct? A. Yes, sir.

Q. All right. Now what kind of a cast was put on this time?

A. Plaster of paris, the same thing—a spy cast.

Q. A spy?—

A. A spy cast, from this leg up to my waistline, and the whole foot and leg of the right leg.

Q. And you say this leg—you are referring to the left leg from the knee up to your waistline?

A. Yes, sir.

Q. And the right leg, the entire right leg up to your waistline?

A. Yes, sir, the foot and all.

Q. Now were your legs together when you were in that cast or were they spread apart?

A. About like this (indicating with arms).

Q. And about how long did they have that spread cast on you?

A. Oh, all the time until they—they moved—let's see. They had it all the time up until after Christmas, and then they took me out of the cast.

(Testimony of Roger Norman Libbey.)

Q. It was after Christmas of 1950?

A. Yes.

Q. Last Christmas? A. Yes. [57]

Q. And when they took that cast off, did they ever put another one on?

A. Well, they sent me home in a split cast, but I had reported back. See, when I went home on October the 16th, in a wheel chair, got out of bed a few days before that in a wheel chair.

Q. I see. You were sent home in a wheel chair?

A. Yes, sir.

Q. On the train and all?

A. No, I was driven home.

Q. Oh. But did you take the wheel chair home with you?

A. Yes, sir; it was a folding GI chair.

Q. All right. And were you given a leave of absence? A. Yes, sir.

Q. For how long? A. Six weeks.

Q. And during that six weeks leave of absence while you were home, did you have the cast on all the time? A. All the time.

Q. Were your legs still spread?

A. Yes, sir, I laid right in bed.

Q. Were you in bed all the time?

A. Yes, sir.

Q. Were you in bed all the time you had the cast on?

A. Sometimes they lifted me into the wheel chair and taken me [58] outside in the sun and wheeled around.

(Testimony of Roger Norman Libbey.)

Q. I see. All right. Now what happened then after that six weeks leave of absence?

A. Well, about Thanksgiving time, I went back to the hospital. I was driven back by my brother-in-law, and they removed the cast, X-rayed it and said I needed another cast. Put me right back into the plaster of paris and sent me home again.

Q. I see. And how long were you in the hospital on the second time? A. About six days.

Q. All right. Now during that period, did they put the same type of a cast on that they had before?

A. Yes, sir.

Q. Were your legs still spread like you have indicated? A. Yes, sir.

Q. All right, and they sent you home in a wheel chair again? A. Yes, sir.

Q. When you got home, did you have to go to bed or were you able to be up?

A. I had to go to bed right away and I got up maybe a couple of times a day to get some sunlight or something.

Q. And you wore that cast, as you told us before, until after Christmas; is that correct?

A. No—yes, sir.

Q. That is, three casts; are those all the casts that you have [59] had?

A. Well, I had the cast that was put on in Mercy Hospital—

Q. That is one; and one that you had on after you got out of traction would be two?

A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. And the one that you had put on while you came, when you came back from your leave of absence would be three. Were there any others?

A. No; after I come back after Christmas, why, they split the cast.

Q. They split the cast? How?

A. And took me out of it, lifted me out of it on the X-ray table, X-rayed it and put me back in the same split cast, taped it together and sent me home.

Q. Oh. And was it the same cast that you had before your legs—with your legs spread out?

A. Yes, it was taped back together.

Q. Yes. And you say that was after Christmas?

A. Yes, sir.

Q. All right. Well then, how long did you remain in the cast after they put you back in it again?

A. Well, he said, he either phoned me or said for me to phone him. So my brother-in-law phoned him. He says we could take off the cast.

The Court: When was that? [60]

The Witness: After Christmas.

Q. (By Mr. Ryan): Well, how long after Christmas?

A. Oh, let's see. About a couple of weeks, something like that.

Q. Couple of weeks, all right. And have you worn a cast since then? A. No, sir.

Q. All right. Now here it is July, 1951. How many times have you been in the Southern Pacific Hospital this year, 1951?

(Testimony of Roger Norman Libbey.)

A. Well, six weeks later I went back for an X-ray.

Q. Well, were you ever at the hospital for any length of time? A. No, just for an X-ray.

Q. Just for X-rays and check-ups?

A. Yes, sir.

Q. All right, and right at the present time are you under leave of absence from the hospital?

A. Yes, sir.

Q. When was the last time you were in the Southern Pacific Hospital?

A. About two months ago.

Q. How long a leave of absence were you given?

A. Two months.

Q. And were you supposed to be back right now or at the time of the trial? [61]

A. Yes, I was supposed to report there now.

Q. Pardon me?

A. I was supposed to be up there now.

Q. Right now. And you intend to report back after the trial; is that right? A. Yes, sir.

Q. All right. Now have you ever done any work since this accident? A. No, sir.

Q. Now let me ask you this: Did you ever suffer much pain following, immediately following the pain, or the accident, rather? A. Yes, sir.

Q. And where did you have the pain?

A. Right in my femur, and in my knee (indicating).

Q. And are you talking about your right leg?

(Testimony of Roger Norman Libbey.)

A. Yes, sir, and in my back, in back of my head and in my back here (indicating).

Q. What part—you are pointing to your low back? A. Right across here (indicating).

Q. Below the belt line or above it?

A. Right just above the belt line.

Q. All right. Now let me take the pain in your right leg. You say pain in your femur; now what part of your femur or thighbone? [62]

A. Right where it was busted, around the area it is kind of hard, kind of dead-like, where the bone went through the flesh.

Q. Have you got scars there? May I see that, please, if I could?

(Witness raised pants leg on right leg and exhibited scars to jury.)

Mr. Ryan (Continuing): Now I point out these two holes you see here. What made those scars?

A. The pin, where the pin went through.

Q. That is where the pin went through, and then what is this scar on the outer side of your right leg just above the knee?

A. That is where the bone went through.

Q. That is where the bone went through. Now when you say—do you have any pain there today?

A. It hurts right around here.

Q. And by “around here,” you are indicating around the scar where the bone broke through?

A. And in my knee right here it hurts quite a bit in here (indicating).

(Testimony of Roger Norman Libbey.)

Q. And does that pain come and go, or is it constant?

A. Well, it aches, oh, when the weather changes, when it gets cold it aches more. But it aches like when I sit here, the leg kind of gets stiff.

Q. Is your leg stiff?

A. Oh, it won't bend but about like that (indicating).

Q. Is that all you can bend your knee up towards your buttocks? [63]

A. That is forcing it.

Q. That is forcing; does it hurt when you do that? A. Right in here (indicating).

Q. All right. Now how about the strength of that leg? Have you got any strength in it?

A. What do you mean?

Q. Well, I mean, can you walk—how far can you walk today? You used to walk seven miles before the accident? A. Not very far.

Q. About how far could you walk, a couple of blocks?

A. A couple of blocks. I get pretty tired at the end of two blocks.

Q. Have you ever walked an awful lot more than that, or more than that at all? A. No.

Q. Since the accident?

A. That is the most I have tried to walk.

Q. Did you have to use crutches when you first got rid of the casts? A. Yes, sir.

Q. How long did you use crutches?

A. I got off crutches in the latter part of March.

(Testimony of Roger Norman Libbey.)

Q. Latter part of March? A. Yes.

Q. And after discarding the crutches, did you ever have to [64] use a cane? A. Yes, sir.

Q. I notice you don't use a cane today, do you?

A. No.

Q. When did you discard the cane?

A. Oh, about the last time I was down at the hospital, the doctor told me to try my best to walk without it.

Q. And have you been doing that or trying to do that?

A. Yes, I walk with it once in a while, like, if I am downtown or if I am walking, you know, to go to a show or something like that.

Q. Who was your chief doctor at the S. P. Hospital? A. McRae and Dr. Flynn, Dr. Shortes.

Q. Who? A. Dr. Shortes.

Q. Dr. Shortes? A. Yes.

Q. All right. Now let me ask you this: Do you walk with any limp?

A. Yes, this leg is shorter than the other leg.

Q. Have you done anything to try to compensate for the shortness of the right leg?

A. I had my heel built up by——

Q. You had—I see. You had that heel built up?

A. It is not tall enough yet. [65]

Q. It isn't?

A. (Shaking head in the negative.)

Q. Now can I see the other heel? (Examining.)
I see.

(Testimony of Roger Norman Libbey.)

Mr. Ryan: With your Honor's permission, would you show how you can walk?

The Court: Well, of course he has already done that in coming to the stand.

Mr. Ryan: Thank you. That's correct, your Honor.

Q. (By Mr. Ryan): Let me ask you this. Could you do this? Could you walk up a flight of stairs with one leg after the other on stairs (indicating)?

A. No.

Q. How do you climb up a flight of stairs?

A. Well, put one leg ahead of the other one.

Q. Do you have to start with any particular leg?

A. Well, I start with my left leg, most of the time, because it is stronger.

Q. Is that the reason you start with the left leg, because it is stronger?

A. It is stronger. I mean, I might fall down otherwise.

Q. Have you ever fallen down through the weakness of your right leg?

A. A couple of times my leg give out on me.

Q. What were you doing at the time?

A. Oh, you know how a weak joint is; sometimes it just gives [66] out on you.

Q. I see. Have you ever tried to do any work around the house?

A. No.

Q. Don't help your wife?

A. I have sat down and peeled spuds and things like that and helped her.

(Testimony of Roger Norman Libbey.)

Q. Helped your wife cook. Now do you wash dishes for her?

A. Sit down when I wash dishes for her.

Q. Are you able to stand for any length of time?

A. Not for any length of time.

Q. How long can you stand?

A. A few minutes at a time.

Q. A few minutes. You mean less than five minutes?

A. Yes. You see, the leg has got a bow in it like that, and it won't straighten out. You see, like the other leg is straightened out, it won't straighten out. In other words, I have to—if I don't raise my foot up like this, if I put it clear down like this, it throws my hips off (indicating). I can't stand erect unless I just stand on this leg and hold this leg up.

Q. When you walk, as far as your left leg is concerned, do you have to walk on the ball of your foot or on your toes?

A. Yes, sir.

Q. Why is that?

A. Well, it is shorter than the other leg. I have to walk [67] like that or else my hips would be—I wouldn't be level. It throws this hip back like that.

Q. And does that throw you off balance in walking?

A. Yes, sir.

Q. Now I want to ask you about that bowing. You have indicated on your right leg that bowing, and by "bowing," do you mean that the thighbone, instead of being straight, goes out in the shape of a bow, like a bow and arrow?

(Testimony of Roger Norman Libbey.)

A. That—it tips like that (indicating). You can see, when this is straight, it tips off like that. See, this is straight here, and it tips.

Q. All right. Now in recent months, take the last four or five months, has there been any improvement in that bowing condition? I mean, has it gotten any straighter?

A. No. The bone is healed, the doctors told me, well, at the S. P., several doctors told me that it was just such a bad fracture, that it is the way it would have to be healed. They couldn't set it no better.

Q. I see. Oh, yes. What is the condition of your back? You mentioned something about pain in your back?

A. Well, when I straighten up a lot, like that, it hurts right across here (indicating).

Q. When you straighten up?

A. Yes, sir.

Q. Does it hurt you when you bend away [68] over?

A. If I bend over, it does, right across here (indicating).

Q. All right. Now is that a constant pain or does that come and go?

A. Oh, only if I straighten up like that, it hurts through here. And if I bend over, it hurts through there.

Q. Did you have that before this accident?

A. No, sir.

(Testimony of Roger Norman Libbey.)

Q. Can you sit for any length of time without discomfort? I notice you have been on the stand for almost half an hour or so.

A. Well, my legs get stiff. It gets kind of stiff, and I keep shifting around like this (indicating).

Q. That helps you, helps you, shifting around?

A. Helps me, yes.

Q. Can you shift—can you sit long without shifting around? A. No.

Q. What happens? What do you feel?

A. This leg seems to get real stiff, like, and all the feeling goes out. The feeling goes out of my toes, gets kind of stiff-like.

Q. You say you have a place in your, or your toes, rather, where there is no feeling?

A. They get kind of stiff, kind of cold. Ever hit your elbow and it went dead or you put your hand in a certain position, it kind of goes dead. [69]

Q. Well, is that condition one that exists all the time, or just when you sit too long?

A. Just when I sit in a certain position or a certain length of time.

Q. How about the feeling of your leg? Is there any change in that?

A. It feels dead right around this area, and if I lay my hand on it, it hurts.

Q. It hurts?

A. If I force it—I can straighten it out like that, and you can feel it right here. It hurts right in the knee quite a bit.

(Testimony of Roger Norman Libbey.)

Q. All right. And what has been your condition as far as nervousness is concerned, or lack of nervousness?

A. Been pretty nervous ever since. Even my wife told me the other day, I was a lot more nervous ever since the accident than I was afore.

Q. Well, how were you after you had that war wound and when you got back to the States, when you got out of the hospital?

A. I was nervous for a while, but after I come back from the Army Transport, I seemed to be all settled.

Q. And then your old nervousness came back again?

A. (Nodding head in the affirmative.)

Q. All right. How much were you earning as a mechanics' helper at McClellan Field? [70]

A. \$1.28 an hour.

Q. And how many hours a day did you work?

A. Eight hours.

Q. How many hours a week?

A. Sometimes we would get a little overtime on Saturdays, mostly five days; sometimes I worked five and a half, six days.

Q. And what did you get for overtime?

A. Time and a half.

Q. When you were giving up the job at McClellan Field to get the job as a fireman for the Southern Pacific, locomotive fireman, did that pay more money? A. Yes.

(Testimony of Roger Norman Libbey.)

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial.

Mr. Ryan: Well, your Honor, I want to show that he had a right to advance himself if he can, and whether or not he is trying to seek advancement.

The Court: That is speculative, Mr. Ryan.

Q. (By Mr. Ryan): Well, anyway, you left the Field and tried to go with the Southern Pacific?

A. So I could make more money.

Q. Pardon me? What did you say?

The Court: Well, he has already answered that, Mr. Ryan.

The Witness: I thought I could make more money. I mean, I couldn't hardly support my family with the money I was making. [71]

The Court: What did you average at McClellan Field?

The Witness: About \$190 a month. That's all. You can't hardly live with that. We had a baby was due, and I had to pay the hospital bill, and it kind of worried me.

Mr. Ryan: All right, that's all.

Cross-Examination

By Mr. Dunne:

Q. Mr. Libbey, you were wounded during the war in the latter part of 1945, is that correct?

A. '43.

Q. '43. And you were sent then to a Marine or Army or Navy Hospital? A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. Where was that? A. New Zealand.

Q. How long were you in that hospital?

A. I came back around Christmas time of '44.

Q. And were there, from some time in '43 then, until the latter part of 1944? A. Yes, sir.

Q. And were not discharged thereafter until some time in 1945, is that correct?

A. Yes, sir.

Q. Now taking that as one time in the hospital; now, then, at some later time that you gave us, you went to sea to do some work at sea? [72]

A. Yes, sir.

Q. And you injured that same left leg that had been wounded? A. Yes, sir.

Q. You injured it by fracturing the kneecap?

A. Yes, sir.

Q. And you were then in the hospital the second time? A. Yes, sir.

Q. Now after you were discharged from the hospital that time and you gave us the date and I have forgotten it, about when was that? In '47, was it? The latter part of '47? A. No, it was in '48.

Q. '48? A. Yes, sir.

Q. Now from that time, the latter part of 1946, up until the time of this accident, at Roseville, in the Southern Pacific roundhouse there, in August of 1950, were in the hospital again?

A. I had an automobile accident and I had my left arm fractured. I have the date down here.

Q. Will you give us that, please?

(Testimony of Roger Norman Libbey.)

A. Let's see. It was about the last part of August, 1949.

Q. And how long were you in the hospital that time?

A. Approximately about six weeks, something like that.

Q. What hospital was that?

A. Oak Knoll. [73]

Q. That is the Navy hospital over at Oak Knoll?

A. Yes, sir.

Q. That injury was what, a fractured arm?

A. My left forearm, or I guess what you would call it.

Q. May I see the notes that you are using?

A. Yes, sir. (Producing.)

Q. Did you make up this set of notes, Mr.—

A. During the deposition.

Q. That is, earlier this year your deposition was taken? A. Yes, sir.

Q. And in getting ready for it, you made up this set of notes?

A. No, at the time the deposition was taken, I couldn't remember everything and I just took down some notes so I could remember the dates, different things.

Q. Well, didn't you have this with you at the time the deposition was taken? A. Yes, sir.

Q. So it was before the deposition you made this up? A. Yes, sir.

Q. And you made it up so that when your deposition was taken, you could use it then?

(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. And when your deposition was taken, you did use it then, didn't you?

A. Yes, sir, I did. [74]

Q. I say that because on your deposition there is a reference to it, and I want to know if this is the same paper you had then? A. Yes, sir.

Q. So that you were out of work on account of your broken left arm from August 31, 1948, until February of 1949, isn't that correct?

A. Yes, sir.

Q. Then you were mistaken when you spoke of your broken arm?

A. Well, we all make mistakes on dates.

Q. Well, I understand, but we want to get it straight now. A. Yes, sir.

Q. Because it was my recollection, when I was asking you about that a few minutes ago, you said that that was in August or some time in the latter part of 1949.

A. It was in August, '48, when I had my arm busted.

Q. And you were out of work on that account then, up until February of 1949? A. Yes, sir.

Q. I will give these back to you now.

A. Thank you.

Q. I just have one or two questions for you before we suspend at four o'clock.

The Court: Well, I don't want to hurry you at all, but, you have quite a few questions? [75]

(Testimony of Roger Norman Libbey.)

Mr. Dunne: Well, I won't finish with him this afternoon, your Honor.

The Court: Well, suppose we run along a little longer, because that sometimes helps to speed the case up a little bit.

Q. (By Mr. Dunne): Well, you correct me if I am wrong, then. So far as being in the hospital is concerned, then, after you first went into the Marines, you were wounded at Guadalcanal and you were in the hospital then? A. Yes, sir.

Q. Then you went to sea and you were hurt and in the hospital then for that second time?

A. Yes, sir.

Q. Then in August, the 31st of August of 1948, you were in an automobile accident?

A. Yes, sir.

Q. And you got your left wrist broken and were in the hospital then a third time? A. Yes, sir.

Q. Now between that time, when you were in the hospital for your wrist, and the time you were hurt up at Roseville, were you in the hospital again?

A. No, sir.

Q. Now in 1945 when you were discharged from the Navy or the Marine Corps, rather, at that time you were given a medical discharge, were you [76] not? A. Yes, sir.

Q. And you were given a disability rating?

A. Yes, sir.

Q. That disability rating at that time was a twenty-five per cent disability rating, wasn't it?

(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. Now when was that changed, or was it changed? A. Well, they claim I got better.

Q. Well, isn't it a fact that that has been the same always?

A. Well, it is ten per cent; you made a mistake.

Q. That's right, that is the question I am putting to you. Isn't that a fact?

A. Ten per cent rating, yes, sir. [77]

Q. Is that the rating that was given to you in the very first instance? A. Yes, sir.

Q. Now you have been receiving payment on account of that, haven't you? A. Yes, sir.

Q. And you have been receiving it ever since?

A. Yes, sir.

Q. You were receiving payment on account of that disability in August of 1950, isn't that right?

A. Yes, sir.

Q. Now, as a matter of fact, so far as the condition of your left leg was concerned in August of 1950, you did have a disability then, didn't you?

A. Yes, sir.

Q. A disability was in your knee for one thing?

A. Yes, sir.

Q. And also any disability in the muscles of the thigh?

A. I couldn't tell you that. I mean, the doctor never did tell me. You can't get a word out of them navy doctors.

Q. Now the disability in your knee was difficulty in bending it, isn't that so? A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. And——

A. (Continuing): My thigh was stiff. You could feel the [78] stiffness in it.

Q. The thigh was stiff and you had disability in bending your knee? A. Yes, sir.

Q. Now, as a matter of fact, when you went to the doctor in Sacramento on the 9th of August of last year, 1950, that you told us about, he never asked you to bend your knee, did he?

A. No, sir.

Q. He just asked to see you walk, isn't that so?

A. Yes, sir.

Q. And you showed him how you could walk?

A. Yes, sir.

Q. Now when you thought about the possibility of going to work for the Southern Pacific Company, who was the first person in the Southern Pacific Company that you went to see about it? I don't mean some friend of yours that you were talking about, but when you decided to go and apply for a job.

A. In Roseville I believe Lonergan was his name.

Q. That is Mr. Lonergan?

A. Yes, I am pretty sure. I don't know the fellow's names very well.

Q. Now has—strike that. Do you happen to know who he was?

A. I believe it is on my paper, Lonergan. Isn't it?

Q. Let me suggest this to you. If you don't

(Testimony of Roger Norman Libbey.)

know, don't say [79] so just because I say so. He was master mechanic at Roseville?

A. Yes, sir.

Q. Now at Roseville, when you went there to Mr. Lonergan's office, did you talk to him?

A. Yes, sir.

Q. And did you at that time in his office, sign a paper?

A. It has been so long ago it is pretty hard to remember. I believe I did.

Q. Do you remember what kind of a paper that was?

A. I don't remember.

Q. And then after that you went on down to the office in Sacramento?

A. Yes, sir.

Q. Up on the second floor of the station building there?

A. Yes, sir.

Q. That is where the general superintendent's offices are, isn't that right?

A. Yes, sir.

Q. And when you went there, did you sign a paper there?

A. I filled out unemployment papers there—a form, I mean.

Q. Let me show you this paper and ask you if the signature "Roger Norman Libbey" is your signature?

A. Yes, sir.

Q. And that was signed by you at Sacramento on the 9th of August, 1950? [80]

A. Yes, sir.

Q. Now, was that when you first went there or after you came back from the doctor?

(Testimony of Roger Norman Libbey.)

A. I believe it was after I went to the doctor, because it says, "I assume all risk," and everything.

Mr. Dunne: All right, we will offer this as our next exhibit in order.

Mr. Ryan: Your Honor, I object to that on the ground it is incompetent, irrelevant and immaterial, and it will revolve around the points of law that we will have to discuss later with your Honor. I object to it specifically on the ground that it is irrelevant, because it is given in violation of Section 5 of the Federal Employers Liability Act, and I won't argue it now, but just state that.

Mr. Dunne: Counsel went in very fully to what happened at the time he first made application. Now this is part of that same story.

Mr. Ryan: Yes, but, your Honor, I submit, I will go into that, that a waiver such as is contained there is against the policy of the law and is illegal, as a scheme or device to try to avoid liability in cases of this sort. And Section 5 of the Federal Employers' Liability Act specifically prohibits those kind of contracts being legal.

Mr. Dunne: That's if there is employment under the Act.

Mr. Ryan: Yes. [81]

Mr. Dunne: We haven't reached to that question yet.

Mr. Ryan: But I submit that he has already, the testimony so far shows that he was an employee, and under that case that I cited to your

(Testimony of Roger Norman Libbey.)

Honor, a student fireman is an employee under the circumstances such as these.

The Court: Well, all this is is a waiver, an exemption.

Mr. Dunne: Well there is also some recitation at the beginning of that which may reflect on what the relationship was. That is a question as yet to be determined, and it can't be determined by telling half the story.

The Court: Well, I will reserve ruling on that. The only point is whether or not this should be read to the jury or given to the jury at this time or not. The plaintiff just said that he signed it. We will mark it for identification as No. A for the defendant, and I will reserve ruling on it, whether it should be admitted. Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A marked for identification.

(Whereupon document identified above was marked defendant's Exhibit No. A for identification only.)

Q. (By Mr. Dunne): I am going to show you a paper here, Mr. Libbey, and on the face of it you will notice that there are four different types of things on it. First, there's some printing, and then there is some typewriting. Then there is some writing in pencil. It looks to me like indelible [82] pencil. Then there are some things in there in ink. Now if you will just take and look at the face of this first and hold it so you can see it. Now, of

(Testimony of Roger Norman Libbey.)

course, none of that printing was anything that you put down there, was it? That was there already?

A. No, I didn't put this up here down.

Q. No. And you didn't put any of the type-writing down?

A. I didn't put no typewriting down, no.

Q. All right. Now if you look toward the center of it you will see some changes made, one change made in ink and then some other words, two other words written below in ink. Is that your writing, that ink writing? Do you see what I mean?

Mr. Ryan: Show it to him, counsel.

Mr. Dunne (Continuing): Let me show you what I mean.

A. This is not my writing there (indicating).

Q. These two things, there and that in ink; now that is not your writing, is it? A. No.

Q. Now will you look at the rest of that that is in indelible pencil, the part that is in indelible writing is your handwriting, isn't it?

A. Yes, sir.

Q. Let me see it just a moment now. Now over on the back there [83] is one place where there is some ink writing here. There is a change there which seems to be in ink, and there is some ink writing down at the bottom, some signatures and some stamped material and so forth on the back. Now none of that is yours, is it? A. No.

Q. But on the back there is also some handwriting, some longhand writing? A. Yes.

(Testimony of Roger Norman Libbey.)

Q. That is in pencil, the same kind of pencil as on the front? A. Yes, sir.

Q. Then down there, there is a signature there, which is your signature, isn't it? A. Yes, sir.

Q. Now the part that is on the back of that, that is in the pencil writing; that is also in your handwriting, is it not? A. Yes, sir.

Q. Now where did you fill that out?

A. It was up in the office, I think, up there in the—up above.

Q. In Sacramento? A. Yes, sir.

Q. That was on the second floor when you were sent down to Sacramento by Mr. Lonergan? [84]

A. Yes, sir.

Q. That was on the 9th of August?

A. Yes, sir.

Q. Let me look at it a minute. And here on the back it says, "applicant's signature."

Mr. Ryan: Just a moment, counsel. What is that you are referring to? Because there is a certain portion I am going to object to.

Mr. Dunne: I am not offering it yet. I am just referring to a signature and the date.

Mr. Ryan: Oh, all right.

Q. (By Mr. Dunne): You notice here it says, "Roger N. Libbey; date, 8/9/50." Now that date was written in by you? A. Yes, sir.

Q. All right.

Mr. Dunne: We will ask that this paper, as counsel says there is going to be some objection to

(Testimony of Roger Norman Libbey.)

portions of it, at any rate, be marked for identification.

The Clerk: Defendant's Exhibit B marked for identification.

(Whereupon document identified above was marked defendant's Exhibit No. B for identification.)

The Court: There is some discrepancy in the dates, isn't there? I thought the witness said it was the 10th.

Mr. Dunne: No, let's get this straight.

The Court: No, I mean the date on the writing is the 9th, [85] but I thought in the direct examination the witness said it was the 10th.

Mr. Dunne: No, I think not, your Honor.

Q. (By Mr. Dunne): You went down to Sacramento on the 9th, isn't that right?

A. Yes, sir. I made a mistake in the date. I was going to try to explain it to you.

The Court: All right.

Mr. Ryan: He went to Roseville, I think he said, on the 9th and then to Sacramento on the 10th. But this——

Mr. Dunne: This shows the 9th.

Mr. Ryan: That might be wrong. I don't know.

The Court: I see.

The Witness: I forgot whether I took the paper home or not. You see, there's another young fireman with me. He was the one that signed them. I thought—I didn't know that I was supposed to——

(Testimony of Roger Norman Libbey.)

See, I made one or two mistakes, and he was the fireman at the time. See, that signature is—he was the fireman at the time.

Q. (By Mr. Dunne): All right. Well now——

A. (Continuing): And I made a mistake, and he writ in there, I mean, like—he writ my brother's name and made a mistake, and he writ several other names in there. I didn't know—I mean, someone else helped me. I thought it would be all [86] right.

Q. (By Mr. Dunne): On this paper?

A. Yes, sir.

Q. All right. Show me what this fireman wrote in.

A. Oh, just right in here—names of father and mother, if living, and I got my mother's maiden name and her address. And I never did know her maiden name very well, and he spelled her maiden name. Then he wrote down, "Addresses of other relations," he wrote down my brother's name. That is that pen writing right there (indicating).

Q. All right. So that pen writing, you say, wasn't yours, and was made by this other fireman?

A. Yes. He told me, well, he grabbed the pen out of my hand and pulled it—put it down there. I had it down in my, I had a fountain pen in my pocket, but I didn't use the pen. I used the pencil, and he wrote that down there.

Q. All right. Now, on the back is there any writing that he put on there?

A. Yes, he signed his name in pencil. See this

(Testimony of Roger Norman Libbey.)

handwriting right here? Right down at the bottom, the different handwriting. He signed his signature in pencil. I don't know whether it is for reference or what.

Q. Well, you are pointing out the writing that starts in, "Donald J. Bird"? A. Yes. [87]

Q. And it ends up on the next line and says, "Roseville"? A. Yes.

Q. Now those two lines are in the writing of this fireman? A. Yes, sir.

Q. But the rest of the writing on the back is yours?

A. Yes, sir. He helped me fill it out. Several ones I didn't know.

Q. All right. Now let's get back to something else that his Honor raised a question on. You indicated you went down to Sacramento on the 10th. Now so far as this paper that I have here indicates, it indicates that it was made out at Sacramento, and in your handwriting there is the date August 9, 1950.

A. Well, it must have been the 9th, then; I made a mistake, I guess.

Q. In other words, so far as you know, the date on that, when you wrote it down, was the correct date?

A. You know, after a year, and being hospitalized, and everything, you forget them dates. If it just happened yesterday, I could remember.

Q. So that then, according to that, if that is correct, you were in Sacramento on the 9th?

(Testimony of Roger Norman Libbey.)

A. Yes, sir.

Q. And the first shift you went to the round-house was on the 10th? [88]

A. Yes, sir.

Q. The second shift that you went to the round-house, when you were hurt, was on the 11th?

A. Yes, sir.

Q. All right.

A. (Continuing): I am sorry I made them mistakes. I know we all make them.

Q. Well, we will try to get them straightened out as best we can here. And if you think you made any others, just don't hesitate to say so.

The Court: Well, is this a convenient time to suspend now?

Mr. Dunne: Yes, whenever your Honor wishes.

The Court: Are you about finished with that document?

Mr. Dunne: No, I am not. It will take some little time, so this is just as convenient a time as any, your Honor.

The Court: All right. Some of the Jurors come from across the Bay, and we don't like to keep you too long because transportation isn't too good, I understand.

We will take a recess until tomorrow morning at ten o'clock, members of the Jury; please return at that time and bear in mind the admonition that I gave you.

(Whereupon an adjournment was taken until tomorrow morning at ten o'clock, Tuesday, July 10, 1951.) [89]

Tuesday, July 10, 1951—10 A.M.

The Clerk: Libbey vs. Southern Pacific Company, further trial.

Mr. D. Ryan: Ready, your Honor.

Mr. Dunne: Ready.

Mr. D. Ryan: Your Honor please, may we call the plaintiff's doctor out of order? Dr. Guterman is present in Court.

Mr. Dunne: No objection.

Mr. D. Ryan: Dr. Guterman, will you take the stand?

JOSEPH GUTERMAN

called as a witness on behalf of the plaintiff. Sworn.

The Clerk: Please state your full name to the Court and to the Jury.

A. Joseph Guterman, G-u-t-e-r-m-a-n.

Direct Examination

By Mr. D. Ryan:

Q. Doctor, do you maintain an office in San Francisco? A. Yes, I do, at 450 Sutter.

Q. And are you licensed to practice medicine and surgery in the State of California?

A. Yes, I am.

Q. And, doctor, where did you receive your medical degree?

A. I am a graduate of the University of Vienna Medical School in 1927. [90]

Q. That is Vienna, Austria, doctor?

A. That is correct, sir.

(Testimony of Joseph Guterman.)

Q. And, doctor, prior to your graduation from the University of Vienna in Austria, what other college did you go to, or university?

A. I went to the University of Leipzig in Germany from 1921 to 1925, and from 1925 to 1927 I studied at the University of Vienna Medical School.

Q. Doctor, after graduating from the University of Vienna, did you make any specialized studies in medicine?

A. Yes, I did. I completed a six years' course in traumatic and orthopedic surgery, this branch of medicine which deals with injuries and diseases of bones and joints.

Q. And, doctor, where did you take that specialized study in diseases of bones and joints?

A. In Berlin, Germany.

Q. Is that also known as orthopedic medicine?

A. Orthopedic surgery.

Q. Surgery, yes. And, doctor, after your six years of specialized study in the diseases of bones and joints, in orthopedic surgery in Berlin, did you then practice medicine in Europe?

A. Yes, I did, in Warsaw, Poland, from 1933 to 1939, and at that time I was connected with the University Hospital in Warsaw, Poland, in charge of the orthopedic division. [91]

In 1939 I left Europe. I arrived in San Francisco in 1941. I served one year's rotating internship at the city and county Hospital of San Francisco, and after passing my Board I obtained my

(Testimony of Joseph Guterman.)

license to practice medicine and surgery in the State of California on August——

Q. What year was that?

A. August 26, 1942.

Q. And, doctor, since August, 1942, have you been practicing continuously here in San Francisco?

A. That is correct, sir.

Q. And since 1942 have you specialized in any phase of medicine or surgery?

A. My practice is limited completely to orthopedic and traumatic surgery.

Q. And, doctor, are you on the staff of any hospitals in this area?

A. Yes, I am on the staff at Mt. Zion Hospital, Franklin Hospital, Hahnemann Hospital and French.

Q. Do you do any teaching of orthopedic surgery?

A. I have a teaching appointment at the Mt. Zion Hospital.

Q. Doctor, at our request did you examine Mr. Roger N. Libbey? A. I did.

Q. And when did you examine him, doctor?

A. I examined him twice, on July 3 and on July 6, 1951, at [92] my office at 450 Sutter.

Q. Now, doctor, when you first saw Mr. Libbey did you take a history from him?

A. I did, sir.

Q. And what history did he give you, doctor?

A. Mr. Libbey told me that he was 27 years old and that he was employed as a student fireman. He told me that about 10:30 p.m. on August 11, 1950,

(Testimony of Joseph Guterman.)

as he was in the cab of an engine there was a sudden blast of fire from the firebox. His hands and face caught fire and he had to jump off the engine to save his life. He fell. He landed on his right leg, then fell on his back and head. He was not rendered unconscious. Immediately he had a severe pain in his right thigh. He felt the side of the pain with his right hand and discovered the bone protruding under his trousers. He was aware of blood running down his right thigh.

He was taken by ambulance to the Mercy Hospital in Sacramento. He was taken immediately to surgery where under general anaesthesia an operation was performed on his right thigh.

A large plaster of paris dressing incorporating his abdomen, his right thigh, leg and foot, as well as his left thigh, was applied.

On August 12, 1950, he was transferred by ambulance to the Southern Pacific Hospital in San Francisco and he was [93] given several blood transfusions.

One or two days later a large plaster of paris dressing was removed. He was taken to surgery. A pin was placed through the upper part of his right leg. Weights were applied to that pin and he was treated in traction for a prolonged period of time.

During his hospitalization period the wound over his outside of his right thigh was dressed repeatedly. His right knee was aspirated repeatedly and fluid was removed.

(Testimony of Joseph Guterman.)

About two months later the traction was discontinued and the patient was again placed in a double hip spica.

On October 16, 1950, he was discharged from the S. P. Hospital in a double hip spica.

About January, 1951, all immobilization was discontinued and the patient began to walk with the aid of two crutches. Gradually he discarded the crutches and walked with the aid of one cane, and on March, 1951, he discarded the cane.

He has been reporting at regular intervals for the examinations to the Southern Pacific Hospital.

Q. Now, doctor, when you first examined Mr. Libbey, did he also give you his present complaints at that time? A. Yes, sir.

Q. What were they, doctor?

Mr. Dunne: That is objected to as hearsay.

The Court: Well, I always consider that all these long [94] narrations, what the doctor did by way of examination, what he heard by way of history, are all unnecessary in the testimony, and once you qualify the doctor he can give his findings, what he found, and then if the other side wants to cross-examine him—but most of this is repetitious, the plaintiff gives the story and then the doctor gives the story, takes up an awfully long time, have qualified him, he has examined the man, just ask him to state what his findings were.

Q. (By Mr. D. Ryan): Doctor, when you examined Mr. Libbey, when you first saw him in July

(Testimony of Joseph Guterman.)

of this year, did you make a physical examination of his person? A. Yes, I did.

Q. And, doctor, what did you find?

A. I found an old second degree scar measuring one and a half inches by one-half inch over his volar aspect of his right forearm. There was a minor old burn scar over his second metacarpal phalangeal joint, and I am pointing to the metacarpal phalangeal joint on the right hand.

I found that the patient was wearing a three-quarters of an inch high lift on his right heel. His right leg, or his right lower extremity was one inch shorter than his left lower extremity.

The patient walked with a limp. His limp increased while he attempted to walk on his heels and tip toes. His squatting [95] ability was limited to thirty per cent.

I found a slight restriction of right hip movements.

There was a marked anterior bowing of the right femur.

Q. What do you mean by bowing, doctor?

A. A change in the longitudinal axis of the femur, and I will be able to demonstrate this while commenting on the X-rays.

Q. Go ahead, doctor, let us know what you found.

A. There was a bony thickening at the level of the junction of the lower and middle third of the right femur. There was a two inch by one inch old

(Testimony of Joseph Guterman.)

scar over the outside of the right thigh three inches above the level of the knee joint.

There was a diminishing of the size of the right quadriceps muscle, and the quadricep muscle is that heavy muscle in front of our thigh which controls straightening of the leg and contributes to our erect gait.

Examining his right knee I found that his kneecap was barely moveable. There was a marked instability of the right knee joint in the anterior and posterior plane.

There was a marked restriction of any extension or straightening of the knee. He was able to extend his knee to 158 degrees as compared with a normal range of motion of 180 degrees.

I found a marked restriction of knee bending. He was able to bend his right knee five degrees short of right angle, [96] as compared—and range of motion was 85 degrees, as compared with a normal range of knee bending, which is 135 degrees.

I found very slight restriction of right ankle joint movements.

I found also evidence of a disability of this patient's left lower extremity which was due to an injury he sustained in 1943 while in the Marine Corps. This injury also consisted of a fracture of his left femur and healed with restriction of left knee motion with a slight restriction of left hip motion, with no shortening, and I think very slight restriction of left ankle joint motion.

(Testimony of Joseph Guterman.)

Q. Doctor, did you have X-rays made when you examined Mr. Libbey? A. Yes, I did.

Q. And have you those X-rays with you, doctor?

A. I have the X-rays with me and I have reviewed today in Court the X-rays which were taken in the S. P. Hospital and at the Mercy Hospital.

Q. Doctor, I show you the X-rays from the Southern Pacific Hospital. I think you have looked at them before Court. A. Yes, I did.

Q. And I think we have a shadow box over here, doctor, if you would like to put them in.

(Witness at the shadow box in front of the jury.)

A. I have an X-ray of Mr. Roger Libbey taken on August 12th, 1950. [97]

Q. What does that X-ray indicate, doctor?

A. The X-ray indicates that there is a front view of this patient's femur.

Q. What femur is that, doctor?

A. Femur is the large thigh bone, the largest bone in our body.

Q. And what leg would that be, doctor? [98]

A. Based on my knowledge of the case I would say that it would be the right femur, although it is marked with an "L."

Q. And the date again is what?

Mr. Dunne: Marked with an "L"?

The Witness: Right.

Mr. Dunne: That would be "left."

The Witness: August 12, 1950, and I am sure

(Testimony of Joseph Guterman.)

that is a mistake which happened when the man was admitted.

Q. (By Mr. D. Ryan): What does it show, Doctor, that X-ray?

A. The X-ray shows that the lower half of the right femur is immobilized in a basket splint. There are fine shadows, metal shadows which are the upper part of a basket splint. The X-ray shows also that there has been a comminuted fracture of that femur, that the fracture involves the knee joint, extends into the knee joint.

The fracture is at the level of the lower and middle third. I can count one, two, three, four bony fragments. I see that the femur is displaced to a considerable degree medially, to the inside, and that there is overriding or a shortening of this, of the fragments.

Q. Doctor, what do you mean when you say a comminuted fracture?

A. A fracture which consists of more than two fragments is called a comminuted or shatter fracture. A fracture which consists of two fragments only is called a simple fracture. [99]

Q. Doctor, what is a compound fracture?

A. A compound fracture is a fracture where the bone is in communication with the outside world where it pierces the muscles and skin and protrudes through the skin.

Q. Thank you, Doctor. Doctor, did you examine another X-ray from the Southern Pacific Hospital?

A. Yes.

(Testimony of Joseph Guterman.)

Mr. D. Ryan: At this time, your Honor, I wish to offer in evidence as Plaintiff's Exhibit next in order the X-ray from the Southern Pacific General Hospital dated August 12, 1950.

Mr. Dunne: No objection.

The Clerk: Plaintiff's Exhibit 5 introduced and filed into evidence.

(Whereupon the X-ray above referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

The Witness: I have here an X-ray labeled "A-14702" of Mr. Roger Libbey—that is a later date, I am sorry. I would like to go chronologically.

I have an X-ray labeled "A-14702" of Mr. Roger Libbey taken on August 15, 1950, and from my experience, looking at this label, I know that that X-ray was taken at the S. P. Hospital in San Francisco.

The Court: Well, there isn't any doubt about that?

Mr. Dunne: No.

The Court: These are hospital X-rays? [100]

Mr. D. Ryan: Yes, your Honor.

The Court: Let us eliminate the formalities and just describe the X-rays.

Mr. D. Ryan: Yes.

Q. Put it in the shadow box, please.

The Court: Don't need to identify them.

(Testimony of Joseph Guterman.)

The Court: This X-ray is marked with an "R," which means "right," and I see that the leg was placed in a plaster of paris dressing. I see the contours of the dressing and I see that the fracture has been reduced. There is still, however, evidence of some displacement in that fracture.

Q. (By Mr. D. Ryan): Does that show how the fracture has been reduced, Doctor, by any mechanical method, does it show on that X-ray?

A. No, the X-ray—I wouldn't be able to say how that fracture was reduced. There is a marked change as compared with the first X-ray I showed to the Court.

Q. Yes.

A. I would say that the fracture was reduced by traction, the pull.

Q. Yes.

Mr. D. Ryan: I offer this as Plaintiff's Exhibit next in order, the X-ray dated August 15, 1950.

The Witness: I have an X-ray dated August 21, 1950——

The Clerk: Plaintiff's Exhibit 6 introduced and filed [101] in evidence.

(Whereupon the X-ray above referred to, dated August 15, 1950, was received in evidence and marked Plaintiff's Exhibit No. 6.)

The Witness: Looking at that X-ray I can see that the plaster of paris dressing which was noted on the previous X-ray has been removed. A pin, called a Steinman, it is a metal pin, was placed

(Testimony of Joseph Guterman.)

through the upper part of this patient's right leg. The leg is in a metal frame and you again are able to see the comminuted fracture of the right femur. One fracture line, the second fracture line, the fracture line which goes into the patient's knee.

Q. Doctor, does that X-ray also show the fracture extending in to the femur, into the knee?

A. Very definitely so, and I am pointing out the fracture line which goes into the knee joint.

The Court: Mr. Ryan, I understood Mr. Dunne said in his statement there wasn't much question about these things.

Mr. Dunne: So far as I know there isn't, your Honor.

The Court: And not going to be disputed, why is it necessary for the Doctor to go into the history of the matter?

Mr. D. Ryan: If your Honor——

The Court: Describe the present condition.

Mr. D. Ryan: Yes, I will go into the present condition, seeing these are typical examples of the findings of the [102] Southern Pacific Hospital.

Mr. Dunne: So there is no question I will stipulate the man suffered a comminuted compound fracture of the right femur at about the level of the junction of the lower third and the middle third, and the fracture extended into the knee, and I suppose I better leave it for the Doctor to say what the residual results were.

Mr. D. Ryan: I will put on the present X-ray, your Honor.

(Testimony of Joseph Guterman.)

The Court: I think that would be better, Mr. Ryan, because if there is no dispute about it, it just takes up time.

Mr. Ryan: I will offer this last explanation—last X-ray, August 21, as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 7 introduced and filed in evidence.

(Whereupon the X-ray above referred to, marked plaintiff's Exhibit 7, was received in evidence.)

Q. (By Mr. D. Ryan): Now, Doctor, you testified that you had X-rays taken of Mr. Libbey when you examined him on July 3, did you not?

A. Yes, I did.

Q. And did you have further X-rays taken on your examination of July 6th? A. Yes, I did.

Q. Doctor, let us take them up chronologically then. Would you put in the shadow box the X-ray you took on July 3? [103]

A. The fracture filled in with new bone and consolidated and united, and the films which were taken on July 3, 1951, show the final result of said fracture. I have an X-ray taken by Dr. Joseph Levitin's office.

Q. Taken under your direction, at your request?

A. That is correct, on July 6th, 1951, and you are looking at the side view of this patient's right femur, a picture taken from the side. There is the hip joint and there is the knee joint, and you will

(Testimony of Joseph Guterman.)

see instead of that femur being straight and extending like this, you see the lower fragment is bowed about 20 degrees. I shall be able to demonstrate this on an X-ray still better.

Mr. D. Ryan: I offer this X-ray as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 8 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit 8, was received in evidence.)

The Witness: You are looking at this patient's front view of his right femur and you will see the site of the fracture which is now filled with new bone and which fracture has solidly united at this level.

Q. What about the alignment of that bone, Doctor?

A. The alignment in the front view is satisfactory. The alignment in the side view shows that 20 degrees bowing. [104]

Mr. D. Ryan: I offer this X-ray as plaintiff's exhibit next in order.

The Clerk: Plaintiff's Exhibit 9 introduced and filed in evidence.

(Whereupon the X-ray above referred to, marked Plaintiff's Exhibit 9, was received in evidence.)

The Witness: There is another X-ray which

(Testimony of Joseph Guterman.)

shows the same condition, but it is a better film. I am pointing out to you the side view of the patient's femur, and you see the bowing. The axis of the femur should extend as far as my pencil does, but it is bowing backwards.

On the front view you see the satisfactory alignment, the united fracture, and you see evidence of shortening, that fracture united with a one-inch shortening of this leg.

Mr. D. Ryan: I offer that X-ray as Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 10 introduced and filed in evidence.

(Whereupon the X-ray above referred to and marked Plaintiff's Exhibit No. 10, was received in evidence. [105])

The Witness: I show you again a side view of Mr. Libbey's right knee which shows cystic changes in his knee joint and in the front view and ordinarily a developing spur in the knee joint, symptoms of an arthritis which we call a post traumatic arthritis, an arthritis due to his injury.

Mr. D. Ryan: I offer these X-rays as plaintiff's exhibits next in order, two X-rays, plaintiff's exhibits next in order.

The Clerk: Plaintiff's exhibits 11 and 12 introduced and filed into evidence.

(Whereupon the X-rays referred to were received in evidence and marked plaintiff's exhibits 11 and 12.)

(Testimony of Joseph Guterman.)

Q. (By Mr. Ryan): Now, Doctor, from your examination of Mr. Libbey and the X-rays you had taken, what was your diagnosis of his condition in his right leg? First, your general diagnosis.

A. I felt that as Mr. Dunne has correctly stated that the man sustained a compound comminuted fracture of the right femur at the junction of the middle and lower third; that he also sustained a low back strain and second degree burns of his right forearm.

Q. I believe you testified already, did you not, that the fracture extended into the right knee?

A. That is correct.

Q. And, Doctor, from your examination of Mr. Libbey, how did [106] the extension of the fracture in his right knee affect his right knee, in your opinion?

A. It resulted in a 20 degree loss of extension and 50 degree loss of flexion. It resulted in an instability of his right knee joint manifested by his complaint of his right knee giving away on him while he walks.

Q. And, Doctor, the bowing of the bone of the femur bone in the right leg, is there any way of correcting that?

A. I would not attempt to correct it at the present time any more.

Q. In other words, what effect has that on him, the bowing of the right femur?

A. The bowing of the right femur contributes to his shortening, is part of the shortening; the

(Testimony of Joseph Guterman.)

bowing of his right femur is responsible partially for the loss of knee extension and is a shift in his weight bearing line which puts a strain on the lower back region.

Q. And, Doctor, did you examine Mr. Libbey walking and climbing stairs?

A. Yes, I did. We walked out to the stairway at 450 Sutter Building and I told him to walk up a flight of stairs and to walk down a flight of stairs.

Q. How did he do it, Doctor?

A. I felt that he was very, very much handicapped by walking upstairs and downstairs. His limp increased markedly, his body [107] weight shifted forward and while walking downstairs he started the steps with his left leg.

Q. Doctor, can you explain the pain Mr. Libbey testifies he has in his back?

A. Yes, I can. In my opinion his pain is due to two factors. One, the results of a back strain he sustained when he fell from the engine, and the second factor is the shortening of his right lower extremity, which causes a change in posture and puts additional strain on the junction of the lumbar spine with the sacrum.

Q. Doctor, from your examination mechanically, why should he have pain on standing any length of time?

A. Because his lower extremity is shorter. To equalize the shortening he puts his foot, he stands on his tiptoes with his heels off the ground. He develops pain in his right calf and tension in the

(Testimony of Joseph Guterman.)

muscles of his right thigh and further up, let us say if he would be able to stand a long time he would develop an increase of his lower back pain.

Q. And, Doctor, Mr. Libbey also complains of pain and discomfort in sitting for any length of time. Can you explain that from your examination of this man?

A. Complaint of pain after sitting for a prolonged period of time is due to the post traumatic arthritis of his right knee joint. We know that arthritic joints have a tendency to develop symptoms after being kept in one position for, let [108] us say, any length of time, and therefore the patient has to change the position of his leg or he has to move his knee, and the same complaint he has while getting up in the morning from bed.

Q. And, Doctor, post traumatic arthritis is caused by what, in your opinion?

A. By injury, and it was caused in that case by the fracture which extended into the knee joint causing the damage of the knee joint itself.

Q. Doctor, in your opinion can Mr. Libbey engage in physical labor today? A. No, sir.

Mr. Dunne: Objected to as calling for an improper conclusion.

Mr. Ryan: Withdraw the question.

Q. Doctor, from your examination of Mr. Libbey, his history and the X-rays taken, in your opinion is Mr. Libbey able to engage in physical labor today?

Mr. Dunne: That is objected to as not calling

(Testimony of Joseph Guterman.)

for proper medical opinion. That is not a matter of medical opinion.

Mr. Ryan: It is, your Honor, from the examination; from the examination, from the findings, based upon his opinion, based on findings, plus history.

The Court: Well, I don't know what the basis of that objection is. Isn't a medical man qualified to say what kind [109] of work, what kind of physical work the man can engage in?

Mr. Dunne: That is the point of the objection. I have no objection to describing what the man's condition is.

Q. (By Mr. D. Ryan): Let me ask you this, Doctor: What is your prognosis as to Mr. Libbey, Roger Libbey?

A. The prognosis is a very doubted one, because I feel that he is unable to be engaged in physical labor, and that he is in need of vocational rehabilitation. And I see grave problems for his rehabilitation, because he has complaints when he stands, when he sits and when he walks.

Q. Doctor, do you believe, in your opinion, from your examination and your X-rays taken of Mr. Libbey that he could today engage as a railroad man, climb on and off engines? A. No, sir.

Q. You think he ever will be able to do that in the future? A. No, sir.

Q. Doctor, do you think Mr. Libbey's pain will be permanent? A. I believe so.

Q. For instance, referring to the things you

(Testimony of Joseph Guterman.)

observed, such as the limping gait, what was the prognosis of that?

A. Limping gait will be permanent because it is due to the shortening of his leg, to the loss of extension of his right knee.

Q. Will that shortening of his right leg be permanent? A. Oh, yes, sir. [110]

Q. Is there anything you know, Doctor, that medical science can do so that Mr. Libbey can get rid of the pain he is now suffering?

A. I do know, but I don't advise it in Mr. Libbey's case.

Q. What is that, Doctor, and why?

A. Because he has already a very considerable restriction of left knee motion due to his old injury in 1943, and if one would perform a knee fusion or operation which would leave his knee stiff, one would trouble Mr. Libbey to a very great extent.

Q. Where is his pain he complains of, Doctor?

A. He complains of pain—he complains of pain while walking distances longer than four blocks, in the right knee and the right thigh. He complains of pain while walking stairs, he complains of pain in his right knee joint and thigh while standing for five to ten minutes in one position, and he complains of a pain in his right knee joint after sitting for about a half hour.

Q. And, Doctor, do you feel that further treatment of any kind will result in any significant improvement of his condition?

A. No, I don't recommend any further treatment for Mr. Libbey.

(Testimony of Joseph Guterman.)

Q. Then you feel your findings, from your findings that his present condition is stationary and permanent? A. Yes, I do. [111]

Mr. D. Ryan: That is all, Doctor.

Cross-Examination

By Mr. Dunne:

Q. Doctor, you have before you some notes and a report that you were using. May I see those?

(Witness hands counsel papers.)

Mr. Dunne: Thank you.

Q. That limp, Doctor, you describe as a mild limp? A. Yes, I did.

Q. And the bowing you describe as a mild anterior bowing?

A. That is correct, of 20 degrees.

Q. There is also a bowing in the left thigh?

A. That is correct, sir.

Q. There is also some anterior-posterior instability of the left knee?

A. That is correct, sir.

Q. This man had a congenital abnormality in his lumbar spine?

A. He has 13 thoracic vertebrae.

Q. Only four lumbar?

A. That is correct, sir.

Q. That is a matter that he developed from work? A. That is absolutely right.

Mr. Dunne: Thank you very much, Doctor. No further questions.

(Testimony of Joseph Guterman.)

Mr. D. Ryan: Your Honor please, there is one further [112] question I would like to ask on direct. May we open it for that?

The Court: Yes.

Direct Examination

(Continued)

By Mr. D. Ryan:

Q. Doctor, I believe you mentioned that there was a grave rehabilitation problem, vocational rehabilitation problem in this case. Why is that, Doctor?

Mr. Dunne: That has been asked and answered.

Mr. D. Ryan: He didn't explain why. I believe I asked him another question——

Mr. Dunne: Let us not take the time, I will withdraw the objection.

A. Because I think the agency which is concerned with vocational rehabilitation will have great problems in reeducating Mr. Libbey to some kind of a gainful occupation.

Q. In what respect, why, Doctor?

A. Because he is handicapped when he stands, when he walks and when he sits.

Mr. Ryan: Thank you, that is all.

Cross-Examination

By Mr. Dunne:

Q. Doctor, you spoke of that agency, that is the Bureau of Vocational Rehabilitation of the California State Department of Education?

(Testimony of Joseph Guterman.)

A. That is correct, sir.

Q. It is a service that the state maintains? [113]

A. That is correct, sir.

Q. For training people who either from sickness or injury have some disability?

A. That is correct, sir.

Q. It is an organization that examines them—examines them for and determines their fitness for a particular job, endeavors to select their job and then gives them training for the job?

A. That is correct, sir.

Q. In this case this man could go there and get training for a bench job?

A. I don't know whether he is suitable for a bench job. You mean, to sit at a bench?

Q. Sit at a bench, do bench work. If he is suitable for it he could get that kind of training?

A. That is correct, if he was suitable he could be a barber, a watchmaker. They have many jobs, and they select the right job for the right disability.

Q. And that is the service that the state maintains in conjunction with the Office of Vocational Rehabilitation of the Federal Government; the two governments work together on that?

A. That is correct, sir.

Mr. Dunne: I have no further questions.

Mr. Ryan: That is all, Doctor.

The Court: That is all, Doctor.

(Witness excused.) [114]

The Court: We will take the mid-morning re-

cess at this time. Ladies and gentlemen of the jury, please bear in mind the admonition of the court.

(Short recess.)

ROGER LIBBEY

resumed the stand, previously sworn.

Cross-Examination

(Resumed)

By Mr. Dunne:

Q. Mr. Libbey, when we suspended yesterday, I had shown you this personal record application form, defendant's Exhibit B for identification. Look at it again so you will know what I am talking about (handing to witness).

Now I think you told us that at the time you made this out, a fireman by the name of Bird was with you? A. Yes, sir.

Q. Now in answer to questions as to education, asking you the name of the school, the location, the time attended, graduated and major subjects your answer was, first, "Silvan Grammar School, Citrus Heights, eight years; graduated, yes; major subject, grammar." That's correct, is it not?

A. Yes, sir, I graduated from grammar school.

Q. Yes. Now look at the next line. Under that in your own handwriting you filled out and stated that you had four years of high school, didn't you?

A. I want to explain that, I wanted to explain it to you [115] yesterday.

Q. Just a moment. We will give you plenty of

(Testimony of Roger Libbey.)

time to explain it. Let's get first what you did. You wrote down four years of high school, didn't you? A. Yes, sir.

Q. And then under the question, "Graduated," you said you had graduated. You wrote down "Yes," isn't that correct? A. Yes, sir.

Q. Now those two answers were untrue, weren't they? A. Yes, sir.

Q. All you had was two years of high school?

A. Yes, sir.

Q. And you made those untruthful answers because you knew that to be employed as a fireman by the Southern Pacific Company they required a high school education, didn't you?

Mr. Ryan: Now one second. I object to that on the ground it is incompetent, irrelevant and immaterial.

A. Well, when I was hired——

The Court: Just a moment.

Mr. Ryan: And no proper cross-examination. In other words, that is a collateral matter, and——

The Court: I don't see anything collateral about it.

Mr. Ryan: But the question as to whether or not he knew that that rule, there is no evidence in here, there is no showing that actually there is that [116] rule.

(Testimony of Roger Norman Libbey.)

The Court: Well, he is asking him if he knew that. I will overrule the objection.

A. I didn't. Mr. Lonergan never said anything at all. The only thing he asked was if I was a vet, or within the draft age. He was afraid, they were taking the boys, and I showed him my birth certificate and discharge papers at that time.

Q. Didn't Bird tell you that it was required?

A. No, sir.

Q. He didn't say that it was required that you have a high school education?

A. No. No, sir, he had many firemen back east and, he was from back east, and they didn't require one back there.

Q. Why did you put down a deliberate misstatement, that you had had four years in high school?

A. I have made a lot of mistakes and after I filled the papers out I was going to go up and tell them. I remembered I had put down four years instead of two.

Q. But you knew perfectly well you hadn't had four years of high school at the time you wrote that in your own handwriting, didn't you?

A. I made a mistake. Instead of putting two, I put four. I mean, anybody can make a mistake.

Q. But you knew at that time that you never had more than two years of high school, isn't that so? [117]

A. I didn't mean to make a deliberate mistake like that, though, because I told Mr. Lonergan I only had two years of high school.

(Testimony of Roger Norman Libbey.)

Q. And you knew that you had never graduated from high school, didn't you?

A. No, I went into the service.

Q. That's right, and you wrote down there in answer to that question, "Yes," didn't you?

A. Well, in the service I studied, I had some records, I studied mechanics.

Q. Mr. Libbey, if you will just answer my questions, please. Under the question whether you graduated from high school you in your own handwriting wrote down the answer "Yes," didn't you?

A. Yes, sir.

Q. And that was an untrue answer, wasn't it?

A. Yes, sir.

Q. Now I want to show you another part of this.

Mr. Ryan: Your Honor, before we go on, in other words, to straighten this record out, I wonder if your Honor could tell the jury that the question, there is no evidence that it is the S.P.'s requirements that their firemen have four years of high school. That is absolutely untrue. But the question——

The Court: Please, Mr. Ryan; don't argue the matter [118] before the jury. That wasn't the question. All he was asked was whether or not the statement in the application was correct.

Mr. Ryan: Yes, but counsel has left the impression that they require four years.

The Court: Well, impressions are not evidence.

Mr. Ryan: All right, so long as we understand that.

(Testimony of Roger Norman Libbey.)

The Court: And the witness has already answered that he was not told that it was four years, that four years was required.

Q. (By Mr. Dunne): Now in answer to question No. 10, I will read it first and then I will show it to you. I will read the whole answer and the whole question:

“Have you ever been injured or suffered an amputation?”

“If so, state how, when, where and the nature thereof.”

Now, in your own handwriting to that, you wrote in the answer, “No,” didn’t you? A. Yes, sir.

Q. Now at the time you wrote in that answer, “No,” No. 1, you had suffered an injury to your left leg at Guadalcanal when you were in the service and had been in the hospital over a year, isn’t that so? A. Yes, sir.

Q. And in addition to that, while aboard ship, you had fallen down and fractured your left kneecap, isn’t that so? [119] A. Yes, sir.

Q. Also prior to that time you had been in an automobile accident and fractured your left wrist?

A. Yes, sir.

Q. And at the time you wrote that answer “No,” it was an untruthful answer, wasn’t it?

A. May I explain that?

Q. Now just a moment; I will let you explain it. That was an untruthful answer? A. Yes, sir.

Q. All right, will you now, if you have an explanation, tell us what it is?

(Testimony of Roger Norman Libbey.)

A. See where it says "amputation," like that (indicating)? I thought it meant amputation.

Q. Now just read the whole thing——

Mr. Ryan: Your Honor, I object to counsel cutting him off. He had started to make his explanation. Why don't you let him finish it?

The Court: Had you finished with your explanation?

The Witness: Yes, sir, it says here——

The Court: He started to say he saw the word "amputation," and then you asked him another question. What is it you wanted to say about it?

The Witness: At the time I thought it meant "amputation," amputated limbs is what I thought it meant. I don't draw no [120] pension on an amputee, which I almost was, but I don't.

Mr. Dunne: All right. Will you look at that and read that whole question aloud, please?

A. "Have you ever been injured or suffered an amputation? If so, state how, when, where and the nature therefor."

Q. Now, at the time that you filled out and wrote the answer in, "No," you knew what an amputation was, didn't you?

A. That was a limb cut off.

Q. Yes, and you knew that an injury—you do have an injury, and could have an injury without an amputation, couldn't you?

A. I didn't think it meant that. I thought it meant an amputation, is what I thought it meant.

Q. But at that time, as a matter of what you

(Testimony of Roger Norman Libbey.)

knew, you knew you could have an injury without an amputation?

A. You could have an injury, yes, sir, without an amputation.

Q. And at the time, you knew the difference between the word "or" and the word "and," didn't you?

A. Yes, sir.

Q. "Or" means one thing or something different, doesn't it?

A. Yes, sir.

Q. And "and" means one thing together with another, doesn't it?

A. Yes, sir.

Q. It is perfectly simple English, isn't that so?

A. Well, it reads right here, it is talking about amputation. [121]

The Court: Let's see that (examining).

Q. (By Mr. Dunne): Now, Mr. Libbey, I am going to show you another paper. This one has two sheets as it is folded, so that we have got four sides. Now on this one, on the last sheet, it says part two, and then over on the back it says part three. Now you just look at those two so that you know what I am talking about (handing to witness). Under part two, and over on the back there is some handwriting there. Now none of that handwriting is yours, is it?

A. No, sir.

Q. Now if you will look at the very front, and let me show you—. May I have exhibit B for identification, Mr. Clerk?

The front of that is the same as this exhibit B; it is a carbon copy, made out at the same time, wasn't it?

A. Yes, sir.

(Testimony of Roger Norman Libbey.)

Q. Now I want you to look at the back of that sheet. No, if you will turn it inside out so you can get it back of the first sheet, which would be page two, the page here (indicating). Let me fold it over for you (folding document). Now you will see up at the top there, there is a printed form and there is some ink handwriting. That ink handwriting is not yours, is it? A. No, sir.

Q. Then below that there is a printed heading, "Part" and then a Roman Numeral II, and below that there are some printed [122] questions and there is some handwriting to those printed questions. Then at the bottom there is a signature. Now that signature, "Roger N. Libbey," at the bottom is your signature, isn't it? A. Yes, sir.

Q. You wrote that yourself? A. Yes, sir.

Q. Now let me see. I don't want to make a mistake on this. Now between part one, I said it was a Roman Numeral II but I am mistaken—between part one and the signature, in indelible pencil, there are written in a series of answers. Those are all in your own handwriting, aren't they?

A. Yes, sir.

Mr. Dunne: I will ask that this be marked as our next exhibit for identification.

The Clerk: Defendant's exhibit C marked for identification.

(Document identified above was marked defendant's exhibit C for identification.)

Q. (By Mr. Dunne): Now, Mr. Libbey, on that

(Testimony of Roger Norman Libbey.)

the third question was, "Have you ever received a pension or disability rating from any government or organization? If so, give details"; and for that you wrote in the answer "No," didn't you?

A. Yes, sir.

Q. Now at that time you did have a disability rating from [123] the United States government, didn't you?

A. Yes, sir.

Q. And that was an untruthful answer?

A. Yes, sir.

Q. At that time you were actually receiving disability payments from the United States government, weren't you?

A. Yes, sir.

Q. And are still receiving them?

A. Yes, sir.

Q. Now the sixth question, "Have you ever been confined to a hospital for surgical operation or following an injury? If so, give details briefly"; and to that you wrote in the answer "No," didn't you?

A. Yes, sir.

Q. At that time you had been confined to a hospital on three separate occasions?

A. Yes, sir.

Q. At that time, after the first occasion, the first occasion in the hospital you had had surgical treatment, had you not?

A. Yes, sir.

Q. At the time you wrote that answer in, "No," that was an untruthful answer, wasn't it?

A. Yes, sir.

Q. And you knew that it was untruthful at that time? [124]

A. Yes, sir.

Q. Now may I take this? Now you took this,

(Testimony of Roger Norman Libbey.)

filled this out and took it over to Dr. Cress in Sacramento, didn't you? A. Yes, sir.

Q. And you saw him in his office?

A. Yes, sir.

Q. Now I want you to tell me what the conversation was at that office when you saw Dr. Cress.

A. What do you mean? It has been over a year ago; I can't remember the exact words.

Q. Give us your best memory on it.

A. Well, he checked my heart, checked my legs, checked my——

The Court: No, he wants to know what the conversation was.

Q. (By Mr. Dunne): What was said?

The Court: What did you say, what did he say, the best you can remember.

Q. (By Mr. Dunne): I want to know what you told him, and what he said to you as best you can recall it.

A. Well, the Doctor saw my scars and asked me, and I told him. He asked me to bend my leg and asked me to walk. And I wasn't thinking, at the time I bent my leg——

Mr. Ryan: I beg your pardon. If your Honor please, I couldn't hear that. Could we have that read, please?

The Court: Yes, read that back, Mr. Reporter.

(Record read.) [125]

Q. (By Mr. Dunne): Now do you remember anything else that was said in that conversation?

A. Well, he never asked me to bend my leg, and

(Testimony of Roger Norman Libbey.)

at the time I wasn't thinking of bending it, like you just said. That's all I can remember.

Q. That is all you can remember of the conversation? A. Yes, sir.

Q. Do you remember the doctor writing something down on that piece of paper while you were there? A. Yes, sir.

Q. Now as a matter of fact the doctor saw the scars on your left leg and he asked you about them, didn't he? A. Yes, sir.

Q. And didn't you tell him that you had fractured your leg in your early childhood?

A. No, sir, I did not tell him that.

Q. Didn't he write that down on this piece of paper in your presence? Now look at that; see if that wasn't written down right in your presence (handing to witness.)

A. This is a false statement, sir.

Q. Did he write that in your presence?

A. Not in my presence, because I told him about what happened to my leg, the real story—I told him about it. He asked me what island I was on and I told him.

Q. As a matter of fact, you told him that you had broken [126] your leg and it was before you were in the Marines, and you went into the Marines after that, is that a fact? A. No, sir, I didn't.

Q. And you told him that that injury had never bothered you all the time you were in the service, isn't that a fact? A. Not that I remember of.

Q. You told him that you had had that injury

(Testimony of Roger Libbey.)

when you were a little kid and you had gotten over it, and you had been able to go into the Marines and they had taken you, and you had never had any trouble with it; isn't that what you told him?

A. The only thing I remember telling him is him asking me my past record——

Q. Now after you came back from the doctor and came back to the superintendent's office, the station house at Sacramento, isn't that right?

A. Yes, sir.

Q. And you came back and saw Mr. Rupert; do you remember the name?

A. Yes, sir.

Q. And Mr. Rupert then gave you a lot of general instructions on matters of safety and being careful, didn't he?

A. Yes, sir.

Q. And he gave you a lot of books at that time?

A. Yes, sir.

Q. Gave you a book of rules of the transportation department? [127]

A. Yes, sir.

Q. Gave you a book of rules about the Hours of Service Act?

A. Yes, sir.

Q. Do you remember what other books he gave you?

A. No—handling and operation of engines. I didn't have much time to read them, because I was hurt just a day, just a shift after that. I looked them over.

Q. And did he *giving* you a book on lighting fires in engines?

A. I believe it said all that in the rules and regulations, how to operate an engine.

(Testimony of Roger Libbey.)

Q. But at any rate, he had a book and gave you a book about engines and it had in it about lighting fires, was that right? A. Yes, sir.

Q. Now then, you remember yesterday we had some question about a date, that you had dated this application on the 9th of August, and indicate yesterday that at the time you wrote that date you wrote it down correctly? A. Yes, sir.

Q. Now, then, if that is right, when you were in Sacramento, if that was on the 9th, then you went back to the round house to see Mr. Lonergan the next day? A. Yes, sir.

Q. And he sent you down to see Mr. Farrell, who was the night round house foreman?

A. Yes, sir. It was on the 10th when I saw Mr. Farrell. [128]

Q. Now at the time, at that time, you understood, and you had been told, that you would have to be learning for two weeks and pass an examination before you could be hired as a fireman, isn't that correct? A. Yes, sir.

Q. You did not expect to be paid for that two weeks? A. No, sir.

Q. And you were not, in fact, paid for it?

A. No, sir.

Q. Now then, after that, after you first went to see Mr. Farrell for one shift in the round house, you followed around with the fire-lighters?

A. Yes, sir.

Q. The only names you know for them are Tony and Bob? A. Yes, sir.

(Testimony of Roger Libbey.)

Q. Bob Chavez and Tony Lopez; were those the two fire-lighters? A. Yes, sir.

Q. And you also, wherever you were, one of them would be there or you would be with one of them? A. Yes, sir.

Q. And then that same thing was true on the next day, was it not? A. Yes, sir.

Q. All that was done was to go around and light fires, and you watched them and they told you what to do, is that right? [129] A. Yes, sir.

Q. Now you told us yesterday that the second day you were there, along toward the end of the evening, the end of the shift, some time between ten and eleven or so, they told you there were no more fires to light? A. Yes, sir.

Q. That is when you got on the locomotive with Peterson? A. Yes, sir.

Q. That locomotive was No. 2795?

A. Yes, sir.

Q. Now when you were going around with these fire-lighters, had they shown you what a firing valve was? A. Yes, sir.

Q. It is a handle that is near the fireman's seat-box in the cab of the locomotive? A. Yes, sir.

Q. And here are some pictures that your counsel have put in evidence; I will show you Plaintiff's Exhibit 3. Can you see the firing valve in that?

A. Yes, sir.

Q. Now will you hold that so the jury can see it, and point it out to them? Just put your finger on it.

(Testimony of Roger Libbey.)

A. This here, isn't it (indicating)?

Q. It is a handle there, that handle; there is a rod that comes up and a quadrant, and then a handle to swing around on [130] that quadrant?

A. It is right there, yes, sir.

Q. I see. All right.

Mr. Dunne: May I point that out to the jurors in the far end of the box (indicating)?

Q. And had you learned what the purpose of a firing valve was?

A. They told me to add oil. It was for oil.

Q. Now, incidentally, on this particular day before you got on the engine with Peterson, had you been on engine 2795 when the fire was started?

A. I don't remember, sir.

Q. Don't remember the fire being started in that particular engine?

A. No, sir, I don't remember. I have been trying to think all this time. I don't remember.

Q. You told us yesterday that you noticed that the door of the firebox was open? A. Yes, sir.

Q. When did you first notice that?

A. As soon as I got into the cab.

Q. Now that is as soon as you got into the cab with Peterson? A. Yes, sir.

Q. And it was open about three inches?

A. The width of a sand scoop. It was open a little bit [131] wider, about like that, something like that (indicating).

Q. That opened, and then it was swinging back

(Testimony of Roger Libbey.)

so that as the door would swing it was back a little bit, and in here would be the fire (indicating)?

A. Yes, sir. It opens toward the fireman.

Q. And it opens toward your side, and hinges on the engineer's side? A. Yes, sir.

Q. Now at that time where were you seated?

A. In the firemen's seat.

Q. How were you sitting in that seat?

A. Well, my legs, sitting up like you sit in a chair.

Q. And sitting straight forward, then?

A. Sitting like this, you know—like you are sitting in a chair (indicating).

Q. So at that time the firing valve was over to your right? A. Yes.

Q. As a matter of fact, the firing valve was farther back than the firebox door, isn't that so?

A. Yes, sir.

Q. As a matter of fact, when the puff or whatever it was of fire came out of the firebox door, it came out sideways in your direction, didn't it?

A. Yes, sir.

Q. And came out sideways toward the stem of the firing [132] valve?

A. Had me cut off on the deck, I think it is called the piggy deck or something like that; that deck you go out that is behind the fireman's seat.

Mr. Ryan: May we have that read? We couldn't hear that.

(Record read.)

(Testimony of Roger Libbey.)

Q. (By Mr. Dunne): At any rate, that was the direction it went; it went over toward the fireman's side, didn't it?

A. Yes, sir, had me cut off from getting out.

Q. You never made any attempt to swing off that, swing around and get out on the gangway, did you?

A. It was so doggone hot I couldn't get out.

Q. You never made that attempt, though, did you?

A. It was either burn up or jump out. Didn't have much time.

Q. You never made that attempt, did you?

A. No, sir.

Q. No. Now at any time when you were in that engine, had you touched the firing valve?

A. No, sir.

Q. Had you touched any of the atomizer valves?

A. No, sir.

Q. You know what those are? You know what I am talking about?

A. I know what they are; I never monkeyed with a thing.

Q. You didn't touch a thing? [133]

A. No, sir.

Q. The only thing that you did until this fire came out of the door was just sit and watch?

A. Yes, sir.

Q. You didn't attempt to take any part in the handling of the locomotive at all?

A. No, sir, I did not.

(Testimony of Roger Libbey.)

Q. And you didn't intend to, did you?

A. No, sir.

Q. And nobody had asked you to?

A. Nobody asked me; I figured it was none of my business, because he was backing the engine out.

Q. Now I want you to tell us as best you can how you got up and got out that window.

A. Well, it happened so fast I don't remember. I think I put my hand on the side and swung out with my legs (indicating).

Q. Put your left arm——

A. May I see that picture again?

Q. Sure. Now there are three of them. One just shows the firebox door.

A. I want the one with the window.

Q. But there's one that shows the window from the inside and one that shows it from the outside and shows the arm rest (handing to witness).

A. I believe I threw both legs out forward with my arm, if I [134] can remember, here, and went out that way (indicating).

Q. In other words, you grabbed onto the seat rest, the arm rest and pulled yourself up and swung your legs out?

A. Yes, sir.

Q. Kind of vaulted out, is that right?

A. Yes, sir.

Q. And you landed on your right leg?

A. Yes, sir. Some of it, just a slight force was on my left leg, but most of it was on the right leg.

Q. You got most of the force down there on your right leg?

A. Yes, sir.

(Testimony of Roger Libbey.)

Q. And that is the way you wanted to land, isn't it? Because you knew you had a bum left leg?

A. I knew I had a bum left leg, yes, sir.

Q. And you wanted to take the weight on your right leg?

A. I tried to land on my right leg, but anybody that is crippled on one leg, we always use the other leg without even thinking. You just use it; you just get so used to using it.

Q. And that is the way you landed?

A. Yes, sir.

Q. I see.

Mr. Dunne: I have no further questions. Oh, yes, I have one.

Q. Let me ask you this, Mr. Libbey; have you ever gone to the Bureau of Vocational Rehabilitation of California's State [135] Department of Education in Sacramento?

A. At one time I went, just for a couple of days.

Q. And you haven't gone back since?

A. No, sir.

Q. How long ago was that?

A. I don't remember; '47 or '48. It must have been '47, something like that. It has been so long ago——

Q. But not since you were hurt this time up in Roseville?

A. No, I have been sick all the time and in bed most of the time.

Mr. Dunne: I have no further questions.

(Testimony of Roger Libbey.)

Redirect Examination

By Mr. Ryan:

Q. Mr. Libbey, as a matter of fact, are you still under the treatment of the Southern Pacific Hospital?

A. Yes, sir. I should be there now, I guess.

Q. Yes. And have you been under treatment continuously since this accident?

A. Yes, sir, I report to the little hospital, the first aid station in Roseville.

Q. Pardon me?

A. I report once in a while to the first aid station in Roseville. I did up until my wound healed.

Q. Oh, I see. And what do they do for you at the first aid station in Roseville?

A. They used to dress my leg. I used to get pain pills [136] there from the nurse.

Q. Had there been any time that you had been finished with your treatment from the Southern Pacific Hospital?

A. No, sir, I still have a pass in my pocket.

Q. Yes. Now there's one question I might have overlooked yesterday. You testified that on the second shift, I think you said you fired yourself three locomotives?

A. Yes, sir.

The Court: He said two.

The Witness: Yes, two.

Mr. Ryan: Two, was it?

A. Yes, sir, two.

Q. Do you remember what kind of locomotives

(Testimony of Roger Libbey.)

they were? As to whether they were road engines or switch engines?

A. I don't remember the numbers, but——

Q. I don't mean the numbers.

A. It wasn't the one I was hurt in. I know that.

Q. No, no, do you know whether they were road engines or switch engines?

A. One was aallet and one a switch engine.

Q. What is aallet?

A. It is an engine, it is—well, it's a bigger type engine that goes over the—that pulls the cars over into Reno over the hills. They have to change engines in Roseville. [137]

Q. I see. Theallet is the kind they use going over the Sierra Nevada Mountains?

A. Yes; in the 4000 class, I think.

Q. Yes, and one of the fires that you yourself lit on that second shift was on aallet?

A. Yes.

Q. I see. Now may I see that last form that was used?

Now when you went to see the Southern Pacific doctor in Sacramento, Dr. Walter W. Cress, was this question asked and this answer made by you? No, I had better read it with you. And I am referring, for the purpose of the record, to defendant's C for identification. Now on part one that Mr. Dunne asked you about, I will ask you to state whether or not this question was asked you and this answer given by you:

(Testimony of Roger Libbey.)

“Q. Are you in good health?”

And the answer,

“A. Yes.”

When were you—strike that. And then the question:

“When were you last attended by a physician and for what ailment?”

And the answer,

“A. One year ago, Veterans’ Hospital.”

Now did you give that? A. Yes, sir.

Q. And is that your handwriting in indelible pencil where you said that you were attended by a physician one year ago at the Veterans’ Hospital? [138] A. Yes, sir.

Q. Was that done at the office of the Southern Pacific doctor, Dr. Cress? A. Yes, sir.

Q. Now when you put down that you were treated one year ago at the Veterans’ Hospital, did or did not Dr. Cress ask what you were treated for?

Mr. Dunne: That is objected to as leading and suggestive.

Mr. Ryan: I put it in the alternative.

Mr. Dunne: He should ask for all the conversations.

Mr. Ryan: “Did he or did he not”?

The Court: Overruled.

Q. (By Mr. Ryan): You can answer it.

A. What I was treated for?

Mr. Ryan: Will you read it to him, Mr. Reporter?

(Testimony of Roger Libbey.)

(Record read.)

A. Yes, sir.

Q. (By Mr. Ryan): What did you tell him you were treated for?

A. I was supposed to have an operation on my left knee, but I never did have it.

Q. Is that what you told him?

A. No, but that is what I was supposed to have.

Q. No, no; please listen to my question. I said, "What did you tell Dr. Cress you were treated for at the Veterans' Hospital?" [139]

A. My left leg.

Q. All right. Did he ask you, then, when you told him you were treated for your left leg at the Veterans' Hospital, how you got those scars on your left leg?

A. I told the gentlemen over there before, how. I told the doctor how it happened.

Q. What did you tell him?

The Court: Well, he has already testified to that.

Mr. Ryan: All right.

Q. Is that when you told him in answer to those questions, is that when you told him about how you got your war wound? A. Yes, sir.

Q. All right. And did you not at that time, when you signed this document, Defendant's No. C for identification know that up in the top of it it says this:

"Order for physical examination to Doctor Walter W. Cress at Sacramento, California.

(Testimony of Roger Libbey.)

Please examine in accordance with Company regulations applicant, whose record and signature appear on other side, and whose personal description follows. Height, 5'11½". Weight 165 pounds. Eyes, green. Hair, brown. Complexion, red. Application for employment has student fireman, Division of Sacramento, Southern Pacific Company; years employed by Company, new. Signed, W. L. Jennings, Superintendent." [140]

Did you know that all that was on there?

A. Yes.

Q. All right. In fact, are you the one who handed this document, Defendant's Exhibit C for identification to Doctor Cress when you go to his office?

A. Yes, sir.

Q. And did you know that part three of this document that I am talking about states this: "Applicant is physically average subject for position as student fireman. His application is—," and then the words appear, "rejected," or "refused," and under the words "his application is accepted," there is a circle around it, is that correct?

A. Yes, sir.

Q. "Accepted"?

Mr. Dunne: Well now, in answer to the question, the question was, did he know that. That those things were on there, that is.

Q. (By Mr. Ryan): Let me ask you this question instead of——

Mr. Dunne: Well, why don't you——

(Testimony of Roger Libbey.)

Mr. Ryan: Wait a second. Instead of the one counsel asked, I will ask this question.

Q. After the Doctor filled in the back of it, was it given back to you to bring back to the Superintendent? A. Yes, sir.

Q. And are you the one who delivered it back to the Superintendent? [141] A. Yes, sir.

Q. And before you gave it to the Superintendent, did you look at it to see whether you passed the physical examination or not?

A. It was secured in a—Well, I knew at the time that the doctor told me that I passed it. But he secured it in an envelope.

Q. I see. A. It was sealed.

Q. Yes? He told you successfully passed your physical examination?

A. I saw him circle that there.

Q. No, that is what I am asking you.

A. He circled this right here, that I passed the examination.

Q. And was that in your presence?

A. Yes.

Q. So here's "application accepted," and you saw him circle that? A. Yes, sir.

Q. Did you see him sign this "Cress, M.D."?

A. Yes, sir.

Q. All right. And also in regard to this same paper—Incidentally, he made all this out in your presence, didn't he? A. Yes, sir.

Q. As you told Mr. Dunne, you knew what he wrote down here, is [141-A] that right?

(Testimony of Roger Libbey.)

A. Yes, sir.

Q. All right. Then I will ask you about this——

Mr. Dunne: May I have that last question and answer?

(Record read.)

Mr. Ryan: All right. Now under part two, physical examination, did you see the doctor write this down under this—this is in printing—“skin, scars, ulcers, excessive perspiration and vasco-motor tone.” That is all fine print, and then in ink, whose handwriting is that in ink? Who wrote that?

A. Must have been the doctor.

Q. All right, and in answer to that it says this, “multiple scars left thigh and slight deformity left thigh. Result of compound fracture of femur during early childhood.”

A. I didn't tell him childhood. I told him——

Q. You didn't tell him that? A. No, sir.

Q. And did you see him write this down under “blood pressure”: systolic, 110—diastolic, 76? Did you see him write and fill in that stuff?

A. He was taking my blood pressure and everything; I saw him.

Q. All right. And did you see under “head, negative; eyes, negative; ear, nose and throat, negative; mouth and teeth, negative; neck, negative; heart and arteries, negative; lungs, negative; abdomen, negative for scars hernia or masses; genital [142] urinary, negative; bones and joints, negative; for osteomyelitis,——”

(Testimony of Roger Libbey.)

The Court: Well, you are just reading that, Mr. Ryan. I suppose sometime or other the jury is going to be permitted to see it. I *don't* *that* it serves much of a useful purpose for the attorneys to read this, without letting the jury see all of it.

Mr. Dunne: I didn't offer it in evidence.

The Court: I know you didn't.

Mr. Dunne: But I will at this time, your Honor.

Mr. Ryan: I wanted to get as much of it as I could in evidence, because maybe he won't offer it in evidence. I don't know.

Mr. Dunne: Well, you always assume I won't.

The Court: Well, at sometime or other, I assume the jury will be permitted to see it. There is a basis for admitting it in evidence.

Mr. Dunne: I will make the offer now, your Honor, and we will clear the record.

The Court: Both of them may be admitted?

Mr. Dunne: Yes.

Mr. Ryan: Wait; I have first, and the one that I have just showed the jury, I mean, the one I showed the witness, I have no objection to that one, the one I was referring to.

The Court: Well, what is the number of [143] that?

The Clerk: That is Plaintiff's or Defendant's Exhibit C.

The Court: All right, that is admitted as Defendant's Exhibit C.

The Clerk: Defendant's Exhibit C for identification received in evidence.

(Testimony of Roger Libbey.)

(Whereupon Defendant's Exhibit C for identification was received in evidence.)

Mr. Ryan: All right, now as to the other, I want to merely say this. As to the personal record, this is Defendant's Exhibit B for identification that I am referring to, your Honor; I have no objection to all of it going in, with one exception. The action that the company took after his accident, which is down at the bottom here, is the exception.

The Court: Well, that is obvious——

Mr. Ryan: And that is on the ground that it is a self-serving declaration.

The Court: Well, I notice it is not dated until October.

Mr. Ryan: No, that's right.

Mr. Dunne: I haven't offered that one.

The Court: All right.

Mr. Ryan: With the exception of that——

The Court: All of that document except the action of the company in October may be admitted.

Mr. Ryan: All right.

The Clerk: Defendant's Exhibit B admitted in evidence. [144]

(Whereupon Defendant's Exhibit B for identification only was received in evidence.)

Q. (By Mr. Ryan): You testified in answer to one of Mr. Dunne's questions that Mr. Lonergan, the Master Mechanic—whom he has identified the man as—at Sacramento, questioned you regarding

(Testimony of Roger Libbey.)

your education. Is that correct? A. Yes, sir.

Q. And when you first went up there to get the job, was that when you told Mr. Lonergan that you had only two years high school? A. Yes.

Q. I see. And then in regard to the part of the question, that question there that asked, in that slip that you filled out in the doctor's office, "Have you ever received a pension," did you or did you not tell the doctor that you were receiving a Government pension? A. I told the doctor.

Q. Did you tell him how much of a pension it was? A. I remember distinctly I told him.

Q. How much did you tell him?

A. Ten per cent.

Q. Did you tell him that was for this wound you got on Guadalcanal? A. Yes, sir.

Q. Did he put that down? [145]

A. I don't know.

Q. Oh yes, as long as we are going into that; how much a month were you getting for this ten per cent disability? A. \$15.

Q. \$15? A. Yes, sir.

Q. And that is what you are getting now?

A. Yes, sir.

Q. That has always been ten per cent; you never had a higher rating than ten per cent?

A. At one time I was getting more than that. I wasn't discharged with ten per cent. I was getting \$115 at one time.

Q. I see. You mean when you first came out of the service? A. Yes, sir.

(Testimony of Roger Libbey.)

Q. What percentage of disability were you getting when you were getting \$115 a month?

A. I don't remember now.

Q. I see. Haven't you got the slightest idea?

A. Around 70 per cent or something like that.

Q. Around 70 per cent; all right, and was it brought down from 70 to 10, or did it gradually come down?

A. Well, it came down. Cut in half then, and then cut down to ten per cent, because I was working, see.

Q. I see.

A. I was—you know, when a fellow is working, you shouldn't [146] have——

Q. So you went down from 70 per cent to 35 per cent? A. Yes, sir.

Q. And then you had that for a little while?

A. Yes, sir.

Q. Then it went down to ten per cent?

A. Yes, sir. I was working handling green lumber working in a logging camp.

Q. What percentage of disability were you getting when you were working for the United States Army Transport Service on boats?

A. I think the same per cent. That is probably where they caught up with me.

Q. You mean the ten per cent? A. Yes.

Q. I see; that is when they caught up with you.

Mr. Ryan: That's all, your Honor.

The Court: Anything else?

(Testimony of Roger Libbey.)

Mr. Dunne: I have just one or two questions and I will be finished.

Recross-Examination

By Mr. Dunne:

Q. Now, Mr. Libbey, I want you to look at this again and at the question Mr. Ryan read to you: "Are you in good health? When were you last attended by a physician and for what ailment?" And then it says, "One year ago, Veterans' Hospital?" (handing [148] to witness).

Now you told Mr. Ryan that the doctor looked at that and called that to your attention and you told him that was on account of your knee?

A. Yes, sir.

Q. Well, that was wrong, wasn't it? That hospitalization, one year ago, was when you hurt your wrist in an automobile accident, wasn't it?

A. Well, they also was going to work on my knee, too.

Q. Let's take one thing at a time. You went to the Veterans' Hospital at that time on account of an injury to your wrist in an automobile accident, didn't you?

A. Yes, sir.

Q. And isn't that what you told the doctor?

A. I thought I told him my knee was, they was going to operate on my knee too, after they set my arm, but they didn't.

Q. When he asked you about being in the hospital a year before, you told that was on account of

(Testimony of Roger Libbey.)

your injury to your wrist in an automobile accident, didn't you? A. Yes.

Q. I see. .

A. I remember telling him too I was supposed to have an operation on my knee, too, which I never did get.

Q. And this statement about your left leg, "fractured femur in early childhood"; that is something that the doctor just [148] dreamed up, is it?

A. I never told him that.

Q. Did he say anything about that at all?

A. I told how it happened. It didn't happen in childhood.

Q. Where did he get the word "childhood"?

Mr. Ryan: I object to that on the ground it calls for the conclusion of the witness, where the doctor got the word.

The Court: Unless he knows.

Q. (By Mr. Dunne): Do you know where the doctor got the words "early childhood"?

A. I didn't tell him that.

Q. Do you know where he got it?

A. I don't know.

Q. As far as you know, he just dreamed it up out of the thin air?

Mr. Ryan: Object to on the ground it is argumentative.

The Court: Yes, sustained.

Mr. Dunne: I have no further questions.

(Testimony of Roger Libbey.)

Further Redirect Examination

By Mr. Ryan:

Q. Now let me ask you this in regard to that last question. I thought you told me on my redirect examination of you that when this question was asked, "When were you last attended by a physician and for what ailment?" And you wrote down, "One year ago, Vets' Hospital," you told them that was in connection with your war injury. Did you tell him that or did you [149] not?

Mr. Dunne: That is objected to as no proper foundation.

Mr. Ryan: Well, I want to get this concrete——

The Court: You are going over the same ground again.

Mr. Dunne: Exactly. I think counsel has answered—counsel has gotten his answer on that.

The Court: I think, counsel, he has answered all the questions on that subject already.

Mr. Ryan: I want to just clarify it.

The Court: Well, all right, ask him them again.

Mr. Ryan: All right.

A. At first I went to Oak Knoll with a broken wrist, and then I got there, when I got there, they wanted to operate on my knee too.

Q. No, that isn't my question. I asked you, did you, when you wrote down here that you were in a Veterans' Hospital, did you tell the doctor at that time that you had been treated in Veterans' Hospitals for your war injury?

(Testimony of Roger Libbey.)

A. I told him so.

Mr. Ryan: All right, that's all.

The Court: Well, we will take a recess, members of the jury, until two o'clock. Please bear in mind the admonition of the Court.

(Whereupon an adjournment was taken until this afternoon at two o'clock.) [150]

The Clerk: Further trial.

Mr. Ryan: Mr. Petersen, will you please take the stand?

THEADORE W. PETERSEN

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your full name to the Court and to the jury.

A. Theadore W. Petersen.

Direct Examination

By Mr. Ryan:

Q. What is your first name? A. Theadore.

Q. Theadore? A. Theadore, T-h-e-a——

Q. T-h-e-a-d-o-r-e? A. Yes.

Q. Petersen, P-e-t-e-r-s-e-n?

A. That is right.

Q. All right. Now, Mr. Petersen, where do you live?

A. 512 Nyles Avenue, Rosedale, California.

Q. And what is your occupation?

A. Locomotive fireman.

(Testimony of Theadore W. Petersen.)

Q. By whom are you employed?

A. Southern Pacific Company.

Q. How long have you been employed by the Southern Pacific Company?

A. Since 1943, June the 10th. [151]

Q. And during all of that period were you a locomotive fireman? A. No.

Q. What were you before that?

A. I hired out as a car helper in 1943.

Q. As a what? A. Car helper.

Q. Fireman helper? A. Car, c-a-r.

Q. Yes. When did you become a fireman?

A. 1946, August 31.

Q. And from '46 up to the present time have you been a fireman continually? A. Yes, I have.

Q. All right. And during all of that time since you became a fireman have you been working out of the roundhouse at Roseville, California?

A. That is right, yes, that is the home terminal there.

Q. All right. Now, at the time of this accident what were you acting as?

A. At that time I was a hostler in the roundhouse.

Q. And for how long a period of time prior to the date of this accident, which was August 11, 1950, had you been a hostler in the Roseville roundhouse?

A. Well, Roseville doesn't hire any hostlers as an actual job. [152] It is all locomotive firemen hostling is what it is, and you either make a bid job

(Testimony of Theadore W. Petersen.)

or are—you catch it from the extra board. At that time I believe I had caught the job from the extra board.

Q. I see. So there was no such job known as hostler?
A. Not in Roseville, no.

Q. You're all firemen?
A. That's right.

Q. All right. But my question was this: How long prior to—for how long a period prior to the time of this accident had you done the work of a hostler in the Roseville roundhouse?

A. Qualified for hostling in 1947.

Q. And had you on many occasions from 1947 until August, 1950, acted as a hostler at Roseville?

A. That is right, yes. I don't know how many times, but I had, yes.

Q. All right. Incidentally, there are two roundhouses at Roseville?
A. There is, yes.

Q. And what is the roundhouse where this accident happened, what was that called?

A. Roundhouse No. 2, the big, the large roundhouse.

Q. What kind of engines do they keep up there?

A. At that time they were keeping Malleys and 44 Hundreds, which is a passenger engine. [153]

Q. Yes. These Malleys, let me ask you something about them. What are they used for?

A. Well, that is a freight locomotive for mountain service.

Q. And mountain service where?

A. That is between Roseville and Sparks, Nevada.

(Testimony of Theadore W. Petersen.)

Q. I see. Now, Roseville is a big junction point, isn't it? A. That is the breaking point.

Q. Is that what you call it, the breaking point? What do you mean by that?

A. That is where all the trains come up, are broken up, made into other trains, transferred out.

Q. And then when the trains are broken up and made into other trains where do they go when they go north, to what states do they go?

A. Well, going north they would go into Oregon.

Q. And going east where would they go?

A. Into Nevada.

Q. And Utah also, I guess?

A. That is right.

Q. As far as Ogden do you go?

A. The Southern Pacific goes as far as Ogden, yes.

Q. Do you remember the engine that plaintiff got hurt on? A. No. 2795.

Q. All right, 2795. Now, what kind of an engine was 2795?

A. It is a consolidation engine. [154]

Q. I mean as to whether it was a road engine or a switch engine?

A. It is used in both services.

Q. In both switching and road? Now, at the time of the accident you were taking 2795 some place, weren't you?

A. Taking it from the roundhouse to the relieving track.

Q. To the what track?

(Testimony of Theadore W. Petersen.)

A. Excuse me, from the roundhouse to the preparatory track.

Q. Preparatory.

A. Yes, it was to be used in service that evening.

Q. Yes. Do you know what service 2795 was to be used for that evening?

A. It was called for Bowman Turn.

Q. Pardon me, Bowman Turn?

A. Bowman Turn, that is right.

Q. Bowman—— A. Local freight.

Q. Bowman, B-o-w-m-a-n? A. Yes.

Q. Bowman Turn? A. Yes.

Q. And where is Bowman located?

A. That is, I believe it is eight miles west of Colfax.

Q. And as I recall is——

A. East of Roseville. [155]

Q. Yes. In going east you pass through Ogden first, don't you? A. Yes.

Q. And then Colfax.

A. Colfax, Applegate and Bowman—I mean, Auburn, Colfax.

Q. Yes. All right. Now, on this Bowman Turn what type of cars would that engine pick up?

Mr. Dunne: That is objected to, without foundation.

Mr. Ryan: I submit——

Q. Do you know what type cars they picked up?

A. Well, usually it is refers and gondolas.

Q. All right. Now, refers, what is carried in refers? A. Perishable goods.

(Testimony of Theadore W. Petersen.)

Q. Perishable food?

A. Fruit and vegetables.

Q. Fruit and vegetables. Now, on this Bowman Turn local did they get these refers and so forth and bring them into Roseville?

A. At sometimes they are, yes.

Q. And then when they would bring them into Roseville where would they—would they be put on to other trains and moved out from Roseville?

Mr. Dunne: That is objected to without foundation.

Q. (By Mr. Ryan): Do you know from your years' experience up there?

A. That is usually the procedure, yes. [156]

Q. And would they go out of the State?

Mr. Dunne: That is objected to without foundation, isn't the slightest foundation for this man—

Mr. Ryan: He knows that, your Honor, that is common knowledge up there. Let me ask you a direct question.

Q. When this Bowman local would go up and bring these cars into Roseville, what usually happened to the cars after the Bowman local brought them into Roseville?

Mr. Dunne: Objected to without foundation.

The Court: Well, if he knows.

Q. (By Mr. Ryan): If you know, yes.

A. Do I answer the question?

The Court: Yes.

The Witness: Those cars, as they are brought

(Testimony of Theadore W. Petersen.)

into Roseville are put into freight trains, either moved north, south, or east.

Q. When you say east or north, can you state whether or not they got out of the State of California?

Mr. Dunne: Objected to, without foundation.

Q. (By Mr. Ryan): If you know.

Mr. Dunne: This man hasn't shown that he has the slightest basis for knowledge of where any particular car is going, cars from Bowman are going.

Mr. Ryan: Your Honor, I submit that objection would go to the weight of his testimony rather than to admissibility. I [157] venture to say not only any railroad man in Roseville, but almost every citizen around there know where cars are going after they leave Roseville, going intrastate and interstate.

The Court: You may develop from the witness the extent of his knowledge of the movement of railroad cars and do that first.

Mr. Ryan: Thank you, your Honor. I think that is advisable.

Q. Now, you say you have been a locomotive fireman since 1946—yes, August, 1946; right?

A. Right.

Q. And as such locomotive fireman prior to the time of this accident have you ever taken trains out of the state from Roseville? A. Yes.

Q. Where did you go some of your trips as a fireman, for instance?

A. Run from Roseville to Sparks, Nevada.

Q. Sparks, Nevada? A. Yes.

(Testimony of Theadore W. Petersen.)

Q. Yes.

A. Run from Roseville to Gerber, California.

Q. And from Gerber where did they go beyond Gerber?

A. Go to Dunsmuir and up into Oregon.

Q. Let me ask you this: In any of these trips that you have made as a locomotive fireman from Roseville to Sparks, Nevada, did you ever take any cars that were brought in, any refers, rather, that were brought in on the Bowman Turn and take them out of state?

Mr. Dunne: That is objected to, without foundation. This is just pure guess. This man, if he has seen the manifest, seen the waybills, seen the car tags or otherwise actually knows.

Mr. Ryan: I submit that you don't have——

Mr. Dunne: Purest kind of speculation.

Mr. Ryan: What counsel——

Mr. Dunne: As a matter of fact we know that firemen don't know those things. They are on the engine, go along with the engine, know what weight they have behind them and what cars they have behind *him* and that is all they know.

The Court: This witness also said he was a hostler there and he may have seen the making up of the trains as he handled the engines.

Mr. Dunne: If he has, but so far it doesn't appear, no foundation for this but guess and speculation.

Mr. Ryan: Is there a question pending?

The Reporter: Yes.

(Testimony of Theadore W. Petersen.)

Mr. Ryan: Read the question.

(Record read by the reporter.)

A. I couldn't say whether I did or not. The cars that come into Roseville——

Mr. Dunne: Your Honor please, I think that answers the [159] question.

Mr. Ryan: I submit he is entitled to make an explanation of that. He was going to state something and counsel cut him off.

Mr. Dunne: Can't be an explanation when the witness said he doesn't know, doesn't know whether he did or not.

Mr. Ryan: May I have that answer complete, your Honor?

Mr. Dunne: May I have the question first?

Mr. Ryan: I think he understands the question, he was cut off from his answer.

Mr. Dunne: But your Honor, may I have the question read?

(Question and answer read by the reporter.)

Mr. Dunne: I think the answer—I think the question has been answered, if he can't say whether he did or not, if your Honor please.

The Court: He didn't complete his answer. You may finish your answer.

The Witness: What I was going to say, cars coming into Roseville are made into trains. We receive our train-registered check, the amount of cars

(Testimony of Theadore W. Petersen.)

we have in our train and the amount of weight, but the conductor is the man who receives the waybills and where cars come from.

Q. (By Mr. Ryan): Yes. Now, do you know this, though, that some of these Malleys, which are stationed at the roundhouse at Roseville, carry cars from Roseville out of the state of [160]California? Do you know that of your own knowledge?

A. Yes.

Q. Yes. All right. Now, let us get down to the accident.

The Court: This Bowman Turn trip that you speak of, that is the trip, the local trip that starts at Roseville and goes to Bowman and then returns, or vice versa?

The Witness: The Bowman Turn is called such because between Bowman and Roseville cars are picked up, delivered and spotted, the engine and the engine crew and the train crew goes on to Colfax. They stay there over night and make the return trip the next day to Roseville.

The Court: Is the purpose of these trips to pick up produce and bring it back to Roseville and deliver a shipment from Roseville to Bowman?

The Witness: On the trip up usually deliver empty cars and merchandise; on the trip back you take loaded cars.

The Court: Bring it back to Roseville?

The Witness: And empty cars, that is right.

(Testimony of Theadore W. Petersen.)

The Court: And at Roseville they are redistributed and go out on other trains?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Ryan): As I understand it from your testimony that the refers that are picked up and brought that are picked up and brought into Roseville contain California fruit and vegetables?

A. That is right, from Lumis and Rockland and various other places.

Q. Yes. And then this California fruit and vegetables they are brought in on these cars and remade into other trains that go all over the system, is that right?

Mr. Dunne: That is objected to, without being—without foundation.

Q. (By Mr. Ryan): Do you know that?

Mr. Dunne: Without foundation, doesn't know where——

The Court: Read the question.

(Question read by the reporter.)

The Court: Well, I suppose we always take it for granted in California we do send our fruit all over, but I suppose this witness has no specific knowledge of it. However, I don't suppose that would be too serious.

Mr. Ryan: I don't think so.

Q. Now, getting down to the accident. The evening of August the 11th, 1950, did you see Roger Libbey in roundhouse No. 2 at Roseville?

(Testimony of Theadore W. Petersen.)

A. Yes.

Q. And on that night were you a hostler?

A. I was working as a hostler, yes.

Q. Incidentally, counsel said something in his statement about the difference between an inside hostler and an outside hostler. Do they have that distinction at the Roseville roundhouse? [162]

A. No.

Q. I see. In other words, do you act as both an inside and outside hostler?

A. Well, only those who are qualified for both do. Myself, I am not qualified as an outside hostler.

Q. But you that day, were you supposed to move cars right from the roundhouse to the various preparatory tracks where train crews would pick them up?

A. Just the engine.

Q. That is what I mean, the engine.

A. Yes, just one preparatory track at each end.

Q. Then as I understand it you were qualified to move an engine both inside the roundhouse and outside the roundhouse?

A. The term inside hostler means any engine can be moved on any roundhouse track, and an outside hostler moves an engine on a main line or on a yard track.

Q. I see. Is the preparatory track where you were going to put this engine 2795, is that a roundhouse track?

A. That is a roundhouse track, yes.

Q. While you were acting as a hostler you say you saw Libbey in the roundhouse?

(Testimony of Theadore W. Petersen.)

A. That is right.

Q. Did you know Libbey before?

A. Yes, I did.

Q. And before you saw him in the roundhouse that night do [163] know that he was working for the Southern Pacific Company?

Mr. Dunne: That is objected to, objected to as a conclusion.

Mr. Ryan: Withdraw that.

Q. Before you saw him did you know that he was a student fireman? A. No.

Q. And did you have any conversation with Mr. Libbey when you met him that night? A. Yes.

Q. Please tell us what the conversation was?

A. I just asked him what he was doing. He told me he was a student fireman, that he was taking his two shifts in the roundhouse, going around with the firelighters, said that it was his second shift. I believe I made the statement that he would be all done after that and he could make his road trips, or start his yard trips.

Q. Did he get on that locomotive with you?

A. Yes, I was going after the locomotive when I saw him.

Q. What did you say to him about getting on the locomotive?

A. I asked him if he was busy right at the time and he wasn't. I said, "Well, I am going to move 2795 out." More or less he took it for granted and we both got on the engine at about the same time.

Q. I see. Now, incidentally had you had experi-

(Testimony of Theadore W. Petersen.)

ence before with [164] student firemen there at the roundhouse?

A. I have had experience with student firemen, I have had them on the road with me on several engine trips, road trips. As far as in the roundhouse, why, they are not under my jurisdiction.

Q. Now, can you state whether or not it was customary for them to learn all they could about their job?

Mr. Dunne: That is objected to, too indefinite.

The Court: Yes.

Mr. Dunne: With what we are concerned with here.

The Court: I guess we can assume that anyhow.

Mr. Ryan: Yes.

Q. All right. Anyway, after you got on the locomotive where did you go? I mean, where did you sit, did you stand, or what did you do?

A. I sat down on the engineer's seat box.

Q. I see, and was the front of the locomotive headed into the roundhouse? A. Yes.

Q. And where did Libbey go?

A. To the left side, fireman's seat box.

Q. All right. Now, before getting on this locomotive did you look it over a little bit?

A. Yes.

Q. For instance, did you first find out whether there were any chains on it? [165] A. Yes.

Q. And were there any chains on it?

A. There was, yes. There is on all those parked in the roundhouse.

(Testimony of Theadore W. Petersen.)

Q. Did you remove the chains? A. Yes.

Q. And when you got on the cab did you notice whether the fire was lit on the engine?

A. There was a fire in the engine.

Q. Yes. Did you observe whether the fire door was open or shut?

A. The fire door was propped open with a sand scoop.

Q. I see. How far open was the fire door? Could you do it this way? If it is full open, it is full, or half open, or three-quarters or one-quarter, whatever it was. How far open was it?

A. About three and a half inch gap around the fire door.

Q. And when you are talking about the fire door being opened you are not referring to the little peep hole, but the whole door?

A. The whole door was open, yes.

Q. And it was held open by means of this sand scoop, is that correct? A. That is correct.

Q. How long an instrument was the sand [166] scoop?

A. The shortest—the way it was propped to open, why, it would be held open about three and a half inches. The sand scoop itself is eight to nine inches long, perhaps longer.

Q. That was propped so that the door couldn't close, is that correct? A. That is right.

Q. Now, when you got on the engine what is the first valve you move, or what is the first lever or valve that you move?

(Testimony of Theadore W. Petersen.)

A. You open the air pump valve.

Q. The air pump valve? A. That's right.

Q. I show you a picture and I will ask you if that is a fair representation of the various instruments that are in front of the engineer on the engineer's side on the 27 Hundred type locomotive?

A. It is, yes.

Q. Yes.

Mr. Ryan: All right, I offer this in evidence, your Honor, as our next exhibit.

The Clerk: Plaintiff's Exhibit No. 13 introduced and filed in evidence.

(Whereupon the photograph above referred to, marked Plaintiff's Exhibit No. 13, was received in evidence.)

Q. (By Mr. Ryan): Now, you said that you open up what valve, Mr. Petersen? [167]

A. Open the air pump valve. You can take it from there.

Q. All right. When you open the air pump valve what does that do?

A. That is what supplies air for your brakes and your reversing lever.

Q. I see, so that you would be able to stop if you had to? A. Yes.

Q. All right. What is the next thing that you did then?

A. Have to wait until your main reservoir pressure reaches one hundred and ten pounds. That is on your gauge here.

(Testimony of Theadore W. Petersen.)

Q. Did you do that? A. Yes.

Q. And then what did you do?

A. Then you have to check your reversing lever, which is this lever here.

Q. You are indicating—I will mark that with a one so that the jury can see it, one with a circle around it. That is on the right-hand side of the picture. That is your reversing lever. Did you pull that toward you?

A. Pull it toward you to go into reverse, shove it away to go forward.

Q. Now, after you had the reversing lever in position for a reverse movement then what is the next thing that you did? A. Ring the bell.

Q. Well, yes, but— [168]

A. Got to ring that bell.

Q. After you ring the bell what do you do?

A. Then you open your throttle easy.

Q. And this great big long lever is a throttle?

A. That is right.

Q. When you pull that forward, towards you, does that open it up?

A. You want to pull it open easy, though, pull towards you easy.

Q. I will mark a two on that to show the starting lever.

Mr. Ryan: May I pass this to the jury?

The Court: You can hold it up and show it to them, save time.

Mr. Ryan: Oh, yes.

(Exhibiting photograph to the jurors.)

(Testimony of Theadore W. Petersen.)

The lower corner you see the reverse lever, that sets it in reverse. This great big long lever is the throttle, draw that towards you and that sends steam into the cylinders to operate the wheels, doesn't it? A. That's right.

Mr. Ryan: My finger is pointing to the reverse lever. You pull that towards you, it puts it in reverse and you see the great big lever, that is the throttle and you move that and that starts it going.

Q. All right. Now, please tell his Honor and the jury what [169] happened when you pulled the throttle and started to move?

A. When you—when I opened the throttle on that particular engine it momentarily took the artificial draft from the firebox causing a momentary explosion inside the firebox. Fire and gas just came out of the door, filled the cab with smoke, and from there on I didn't see anything.

Q. Now, from the way the firebox was opened did this fire and gas come out on your side of the cab or the fireman's side of the cab?

A. Came out on the fireman's side.

Q. What happened then when you noticed this fire and gas come out of the firebox? Could you see Libbey for the smoke or anything?

A. No, couldn't see anything.

Q. You mean the smoke was so thick on the fireman's side——

A. It completely filled the cab, the smoke and the gas completely filled the cab.

(Testimony of Theadore W. Petersen.)

Q. Couldn't look across the cab and see who was there? A. That's right.

Q. All right. Do you know what happened to Libbey? A. No, I don't.

Q. What was the first thing that you knew that Libbey was not in the cab any longer?

A. Well, knowing Libbey I figured that he got scared and I wanted to find out if he got burned, so I hollered over to him. [170] He didn't answer.

Q. That is the first indication you had that he was no longer in the cab? A. That is right.

Q. What did you do when he didn't answer your call?

A. Well, I had already stopped the engine, so I went to look. I heard him holler as I got off the seat box.

Q. I see. You mean, when you heard him holler his holler didn't come from the cab, but from the outside of the cab? A. That is right.

Q. How far did the engine move altogether?

A. I would say ten to twelve feet.

Q. Yes. Then did you get out of the cab on your side?

A. No, I got out of the fireman's side, after I pulled the valve and put the fire out.

Q. Pardon me?

A. After I put the fire out.

Q. I see. You put the fire out completely in the firebox? A. That is right.

Q. And you got out on the fireman's side?

A. That is right.

(Testimony of Theadore W. Petersen.)

Q. Did you see Libbey?

A. Yes, he was on the floor.

Q. Incidentally, how far would you estimate that it was from the sill of the window of the fireman's side down to the floor [171] of the roundhouse?

A. A rough guess I would say twelve to fifteen feet.

Q. And what is the floor made of in that roundhouse? A. Concrete.

Q. Concrete floor. Now, let me ask you this: On the date of the accident were you familiar with the rules and regulations of the Southern Pacific Company for the firing and handling of locomotives? A. Yes.

Q. And I will show you, call your attention to Rule 62H under the heading of General Instructions, and wish you would read that first before you answer my question.

A. You want me to read it out loud?

Q. No, you read—you are familiar with that Rule? A. Yes.

Q. Was that Rule 62H, was that in effect at the time of this accident? I mean, it was one of the rules of the Company as of that date?

Mr. Dunne: Just a minute; let him answer, was it in effect, that was the question.

The Witness: No, it was not.

Mr. Ryan: When did it go out of effect?

A. Wait a minute, correction—correction. The Rule, sure was in effect; sure it was. You got me—

(Testimony of Theadore W. Petersen.)

Mr. Ryan: Almost got something there, [172] Arthur.

The Witness: You got me backwards there.

Mr. Ryan: I would like to read this Rule into evidence, your Honor, reading as follows, Rule 62H, of the Rules and Information for the Firing and Handling of Locomotives for the Southern Pacific Company: "Fire door must be securely latched when starting a fire and at all times when locomotive is under fire, except as provided by Rules No. 63, 102, and 170J," which I don't believe are pertinent here.

Q. Now, I also show you Rule 80 and I wish you would read that and tell me if you knew that Rule and if that was in effect at the time of this accident? [173] A. Yes.

Mr. Ryan: All right. Now I would like to read that into evidence, your Honor. Rule 80 is under the heading, "Duties of Hostlers," and it is as follows:

"Hostlers will be held responsible for condition of locomotives under their care while moving them in and out of engine house or on designated tracks. Water level in boiler must be checked by hostlers in accordance with Rule 101."

Q. Then I call your attention to Rule 81(i) under the heading of "Method of Firing Up Oil Burning Locomotives Not Under Steam," and I will ask you if you knew that rule, and if that was in

(Testimony of Theadore W. Petersen.)

effect on the day of the accident (handing to witness)? A. Yes.

Mr. Ryan: All right, I will read that into evidence, your Honor.

Mr. Dunne: Well, that is objected to as incompetent, irrelevant and immaterial. This was lighting fires; this locomotive was already under fire.

Mr. Ryan: Yes, but our complaint charges negligence or if it isn't charged, I want to amend it to conform to the proof, in the way the fire was lit when the men left the firebox door open at that time, too.

Mr. Dunne: Well, that was an hour before. There is no cause or relationship there as to this accident. This fire [174] was burning.

The Court: What is the number of the rule?

Mr. Ryan: 61(i): Would you like to see it?

(Handing book to Clerk who then handed it to the Court.)

The Court: I don't see the applicability of it, Mr. Ryan.

Mr. Ryan: All right. Well——

The Court: It is something that has to do with the manner in which the fire lighters should operate.

Mr. Ryan: Yes. In other words, I am charging negligence in the way the fire lighters lit the fire in this particular engine, because they went away leaving the fire door open, and that act of negligence continued right up to the moment of the accident.

The Court: Well, of course this only applies to

(Testimony of Theadore W. Petersen.)

the manner in which the door was to be kept latched when they started the fire.

Mr. Ryan: Well, perhaps. I don't know.

The Court: I don't see that that necessarily would be helpful here, because there is no evidence as to how the fire was lighted in this particular engine.

Mr. Ryan: I see what you mean, yes, your Honor. And Rule 129; I wonder if I can read this, if you think it is pertinent, without going back to this witness?

Mr. Dunne: You can read any of them if I don't have any [175] objection. I would like to look at it first.

Mr. Ryan: All right, would you take a look at 129, please?

Mr. Dunne: I have no objection.

Mr. Ryan: All right. Rule 129 I will read into evidence:

“Fire door should be kept closed and latched while locomotive is on the road or under fire. When making observations through fire door, guard against the outflash of flame that may follow ignition in case fire should go out by having blower on strong enough to create a draft that will remove all gases from the fire-box.”

Q. (By Mr. Ryan): Now, Mr. Petersen, when you went up to Mr. Libbey on the ground, did you observe his condition? A. Yes, I did.

(Testimony of Theadore W. Petersen.)

Q. And what did you notice about him?

A. The main thing I noticed was his right leg was broken above the knee.

Q. And you could see that with your own eyes, could you?

A. It was a compound fracture; you could see the bone sticking up.

Q. I see. And what did you do when you found him there in that condition?

A. Myself and several other roundhouse employees put him on a stretcher.

Q. I see. Put him on a stretcher and where did you take [176] him?

A. He was taken to the Emergency Southern Pacific Hospital.

Q. Right in the company's yard at Roseville?

A. Yes.

Q. And you took him there, did you?

A. No, I did not go with him.

Mr. Ryan: I see. You may cross-examine.

Cross-Examination

By Mr. Dunne:

Q. Mr. Petersen, let me straighten that one thing first. I first understood you to say that at Roseville there was no distinction between inside and outside hostlers, and then I understood you to say that you were not qualified as an outside hostler?

A. That's right.

(Testimony of Theadore W. Petersen.)

Q. Now an inside hostler is a man who is qualified to move a locomotive on the roundhouse tracks?

A. That's right.

Q. And an outside hostler is a man who is qualified, when necessary, to take a locomotive out onto the working tracks, the switch tracks, or the main line?

A. That's right.

Q. Now as a matter of fact, the outside hostler gets extra pay for that, doesn't he?

A. Yes.

Q. And an outside hostler, when he goes what you call [177] outside, takes a locomotive outside under, onto the working tracks, always has another man with him?

A. That's right.

Q. Inside the roundhouse you move locomotives by yourselves, and work by yourselves?

A. (Nodding in the affirmative.)

Q. Is that correct?

A. That's right.

Q. So that at Roseville there was such a distinction?

A. There is no outside and inside hostlers there, no.

Q. There are no outside hostlers there?

A. No. There's no outside hostling jobs there; there are outside hostlers there, but there are no outside hostling jobs.

Q. I see what you mean. There are no jobs, which, as a regular course, in the regular course in hostling, take a man outside the roundhouse?

A. No.

Q. If an emergency should arise, however, then

(Testimony of Theadore W. Petersen.)

a qualified man would take the engine out as a hostler? A. That's right.

Q. I see. So that when you say there's no distinction, you mean there were no regular jobs that have that?

A. That's right. I didn't make myself clear.

Q. And again, so that we be clear on this, you first qualify [178] as a fireman, is that correct, when you start in firing? The first thing was to qualify as a fireman? A. Yes, sir.

Q. Then after you worked as a fireman for awhile, you qualified to handle an engine?

A. That is after you have been in six months actual service; not six months seniority, but six months actual service. Then you must qualify for inside hostling.

Q. At that time, then, you qualify as an inside hostler to handle engines? A. That's right.

Q. Then from that, you go on to qualify as an outside hostler, and then eventually as an engineer?

A. That's right.

Q. Then you work as an engineer or a fireman, as your seniority permits? A. That's right.

Q. Had you, before the time of this accident, actually worked as a fireman on road jobs out of Roseville? A. Yes.

Q. And you had worked over to Sparks and return? A. Yes.

Q. Now it is part of the job of a fireman to take water into a locomotive, isn't it?

(Testimony of Theadore W. Petersen.)

A. Yes. [179]

Q. And also to take oil?

A. At some places.

Q. And to do that, you have to climb up on the tender? A. That's right.

Q. Open the manholes or open the receiving hole for the oil? A. Yes.

Q. In other words, first to take water, you open the manholes? A. That's right.

Q. Then with a hook, you pull the water column over and take water? A. That's right.

Q. That is part of the fireman's job, to climb up the front of the locomotive and change the markers, isn't it? A. That's right.

Q. And also to change the indicators?

A. Right.

Q. And then climb up on the rear of the tender and change the markers and put up markers when the locomotive is running light?

A. Light, that's right.

Q. Would you tell us what the expression "running light" means?

A. Any engine that is running without a train and is displaying markers and signals. [180]

Q. And when a locomotive is running light and there is any occasion to throw switches, who does that? A. That is the fireman's job.

Q. If a locomotive is running light and there is occasion to flag under Rule 99, who does that?

A. The fireman.

(Testimony of Theadore W. Petersen.)

Q. Did you ever work in helper's service on the Sacramento Division? A. Yes, sir.

Q. Would you tell, because I used that expression earlier, will you tell the jury what helper's service means?

A. Helper's service is helping any first class passenger train or any express train or any freight train over a grade that the engine, that the road engine is not capable of pulling.

Q. That is, it is an extra engine that is put on to the train?

A. It is an extra engine and crew.

Q. And in helper's service, the helper engine helps up to the top of the grade?

A. To the top of the grade, and cuts out of the train there.

Q. Now you and I understand that expression "cuts out," but the jury may not. What do you mean by "cutting out of the train"?

A. At Norden, California, is the summit of the grade. The engine there leaves the train, it is turned around and [181] goes back light to Roseville.

Q. There is also a helper's service from Truckee up to Northern, isn't there? A. That's right.

Q. Now on the evening of this accident, Mr. Petersen, please correct me if I am wrong, because I am going to use the form of leading questions. If I misstate anything, correct me, please. You didn't know that Libbey was around the roundhouse until you saw him shortly before this accident?

A. No, I didn't.

(Testimony of Theadore W. Petersen.)

Q. And you came up to him and asked him, that is, when you asked him what he was doing around there; that was the first time you had seen him around the roundhouse?

A. That was the first time.

Q. And he then told you that he was a student fireman?

A. Yes.

Q. You then told him that you were going to move the 2795, is that correct?

A. That's right.

Q. Did you ask him to come with you?

A. Not directly.

Q. You simply told him that you were going to do this, what you were going to do, and then you went off to do it, is that correct?

A. Well, he came along with me, like I said before; he and [182] I have known one another for quite some time.

Q. However, you knew that he was coming along with you, there was no question about that?

A. Yes, I did.

Q. Now had the fire lighters finished with their locomotive, with that locomotive?

A. Yes, the engine was ready to go out of the roundhouse. Everyone was completed with it.

Q. As a matter of custom and practice in handling locomotives and moving them, the hostler doesn't move them until all of the other roundhouse people have finished with them, isn't that right?

A. Yes, that's right.

(Testimony of Theadore W. Petersen.)

Q. And he doesn't move it until they all get off?

A. No.

Q. You say "no"; you mean——

A. Sometimes they will still be on there when the engine is moved. It is common practice.

Q. That is, machinists? A. Machinists.

Q. Boilermakers?

A. Boilermakers or their helpers; electricians—they may be changing light bulbs and stuff of that sort.

Q. Or men who are still continuing to service the locomotive? [183] A. That's right.

Q. As a matter of fact, on this particular night, were you going to take the 2795 up to the sandhouse? A. That's right.

Q. Now where was the sandhouse located?

A. That is at the top end of the roundhouse.

Q. But it is still within the tracks that are part of the roundhouse?

A. Still within the roundhouse area, yes.

Q. And that was for the purpose of servicing it and putting sand aboard?

A. Putting sand aboard, taking water and oil.

Q. And this isn't directly connected with this lawsuit, but to fill it out, what is the purpose of taking sand aboard a locomotive?

A. That is to keep the engine drivers from slipping on the rails and causing the train to break in two.

(Testimony of Theadore W. Petersen.)

Q. In other words, sand is used in ordinary running of a locomotive to assist in stopping and breaking it?

A. That's right; and it is also used in cleaning the flues of the engine.

Q. Now as long as you mentioned that, and we have talked about a sand scoop——

A. That is where the sand——

Q. The flues—well, the fire is in the firebox at the back [184] end of the boiler?

A. That's right.

Q. The boiler head comes into the locomotive and the firebox is below that? A. That's right.

Q. Then from the firebox there are a series of openings, oh, perhaps two inches, two and a quarter inches in diameter that go through the boiler to the smokebox in the front?

A. (Nodding head in the affirmative.)

Q. Is that correct? A. That's correct.

Q. And the fire from the firebox in the rear, with proper draft, is drawn up and then goes through those flues to the smokebox in front, and then eventually out the stack in front?

A. (Nodding in the affirmative.)

Q. Now you have to answer, Mr. Petersen, because the Reporter has to get your answer, you see, and he can't watch the nod of your head.

A. Yes, all right.

Q. Now those flues in through there, through the boiler, will get dirty, and filled up with carbon?

A. That's right.

(Testimony of Theadore W. Petersen.)

Q. And the manner of cleaning them out is when the locomotive is working steam heavily, so that there is a heavy draft, [185] you just take a scoop of sand and toss it in the firebox?

A. Well, yes—through the peephole.

Q. Then the draft pulls it through the flues and scours out the flues? A. That's right.

Q. That is known as "sanding an engine"?

A. That's right.

Q. And for those of us who have seen locomotives running along the line, when you suddenly see a lot of black smoke, coming out, that means the fireman is sanding the engine?

A. That's right.

Q. And this scoop that we have talked about is the scoop that is used to throw that sand in?

A. To throw that sand in the firebox.

Q. Do you know what a pettycoat pipe is?

A. Pardon.

Q. Well, I may have to put it the other way around first. What is a blower?

A. A blower is an artificial draft for your firebox. It clears the gases and smoke and helps put your fire through the flues we were just speaking of.

Q. It is used to create a draft for the fire?

A. That's right, artificially.

Q. Now where does it actually blow? Does it blow—does the blower create the draft by blowing in the firebox at the [186] rear of the boiler, or in the smokebox at the front? A. (Hesitating.)

(Testimony of Theadore W. Petersen.)

Q. If you can't answer these questions, don't do it.

A. Let's see. I believe the blower blows from the back.

Q. Are you sure about that?

A. No, I am not.

Q. Well, do you happen to know where the draft comes from when the locomotive is working steam?

A. Comes up through the sides.

Q. Comes from the smokebox, doesn't it, through the nozzle in the smokebox?

A. A lot of it does, but I believe there's some comes up from the sides, too, isn't there?

Q. Well, I believe we had better get that from the machinist or the foreman; I don't want to press you beyond your limit on that, Mr. Petersen.

When you got on the engine at the time of this accident, got on there, did this engine have a fire burning in her then? A. Yes.

Q. And steam up? A. Steam up.

Q. Do you remember what your steam pressure was at that time?

A. It was a full head of steam. [187]

Q. About 200 pounds? A. 200 pounds, 210.

Q. She would move, then, without the necessity of changing the fire? A. That's right.

Q. And you moved her without changing fire, didn't you? A. I did.

Q. So that the only thing that you did was to make sure you had air pressure for your brakes?

A. (Nodding in the affirmative.)

(Testimony of Theadore W. Petersen.)

Q. And so that your air pressure would work your power driven reverser? A. That's right.

Q. And put your reverser in position for your backward move? A. That's right.

Q. And ringing the bell and doing other things that were necessary; but so far as the movement of the locomotive is concerned, the handling of the steam and the fire, the only thing you did was to open up your throttle after she was down in the corner, is that right? A. That's right.

Q. Now I have fallen into an expression. I said she was "down in the corner." That means your reverser was all the way down for your reverse movement? [188] A. That's right.

Q. And that is the position you put it in when you start out on a reverse move?

A. That's right.

Mr. Dunne: I have no further questions.

Mr. Ryan: I have no further questions.

The Court: That's all.

Mr. Ryan: Oh, yes, I have just one. Pardon me.

Redirect Examination

By Mr. Ryan:

Q. What was the pay of the fireman——

Mr. Dunne: That is objected to as incompetent, irrelevant and immaterial and without foundation.

Mr. Ryan: Well, your Honor, I don't know if the question——

Mr. Dunne: It is purely speculative.

(Testimony of Theadore W. Petersen.)

Mr. Ryan: I don't think it is speculative. It is a question to be argued as to what his potential earning capacity was.

Mr. Dunne: It is purely speculative as to whether this man would ever have qualified.

Mr. Ryan: I know, but the jury may find out as a finding that he would have.

The Court: I don't see how I could allow a finding like that to stand, because it would be speculative. Because this young man may never have become a fireman.

Mr. Ryan: On the other hand, he may have become one, [189] too, had it not been for this accident.

The Court: That makes it speculative, because we don't know the answer.

Mr. Ryan: As Justice Murphy said in one case, there is a measure of speculation in all cases, but we have to draw inferences.

The Court: I think you cannot, in a suit for damages, recover for something that is not capable of a degree of ascertainment.

Mr. Ryan: Very well.

The Court: You have to be able to ascertain it on some reasonable basis.

Mr. Ryan: I have no further questions.

The Court: That's all.

(Witness excused.)

Mr. Ryan: Now, your Honor, I will rest in about a moment. At this time I offer into evidence,

to read into evidence, the Insurance Commission's 1941 standard mortality table showing that the average expectancy of life of a person of the age of 27 years is 40.36 years. I also offer to read into evidence that the present value of an annuity of \$1 a year for a period of 40 years, discounted at 3 per cent, is \$23.11.

Mr. Dunne: I have no objection to that, if I can read in at the same time, so we get them together—— [190]

The Court: You want to use a different rate of interest?

Mr. Dunne: Yes. Three and a half per cent would be 21.35. Four per cent would be 19.8, and at four and a half per cent, 18.40. Five per cent is 17——

Mr. Ryan: I am going to object to five per cent, your Honor. Under the reasoning of the Southern Pacific vs. Guthrie, which you might remember, Mr. Dunne——

Mr. Dunne: Very well.

Mr. Ryan: And I object on the ground that the Court there approved of the three per cent figure, and I submit that an inexperienced person, that is, inexperienced in finance, would not be required to go out and get investments that would pay more than four and a half per cent. That would be speculative—an inexperienced financier—to attempt to do that.

Mr. Dunne: I will take a ruling, if your Honor please. I want to read the five per cent figure.

The Court: You can read the five per cent. I

Mr. Ryan: Well, we stopped there. think if we got to that point in the case, that I would be inclined to tell the jury that, without any evidence, it would be reasonable to take a three per cent rate.

Mr. Dunne: Well, five per cent figure would be 17.16.

Mr. Ryan: Okay. And with that, your Honor, plaintiff rests. [191]

The Court: Well, I suppose counsel may have some matters to present?

Mr. Dunne: Yes, we have.

Mr. Ryan: Yes, sir, I have, too.

The Court: I will excuse the jury. It is near the afternoon recess time anyhow. The jury may take a brief recess at this time, and the record will show that the Court will remain in session. You may take the jury out.

(Whereupon the jury left the courtroom and the following proceedings were had outside their presence.)

Mr. Dunne: Now, if your Honor please, I want to make a motion for a non-suit or to dismiss; I never know what to call it anymore under the Federal Rules. I think probably it is a motion to dismiss, as to the first cause of action. That is the Boiler Inspection Act cause of action, claiming a defect in the locomotive. There isn't the slightest evidence that this locomotive was in any way defective or not fit for proper service in any respect. I don't pretend to quote the exact language of the

statute, but it is generally that it is fit for service in which it is put, without unnecessary injury to life or limb.

Now certainly the very farthest that any of the cases have gone, and there is no Boiler Act case on the subject, is that the test of the boiler case Act is probably slightly different. In the Myers case, which was a hand brake case, [192] the test is a brake that actually works. They have said you make a case when you show either a specific defect in the brake or that, when properly used, the brake didn't function according to its design and construction. Now the Boiler Act doesn't go that far. It simply says, "safe to be used without unnecessary danger to life and limb."

But in this particular case, the only thing that is suggested of anything that was wrong is that the fire came up out of the firebox door. Counsel has put in evidence here the specific rule, the firebox door should be shut. It is without dispute that this firebox door was open. Now if that evidence means anything and points to anything at all, the only thing that it can point to is improper use of this locomotive in such a way that it would cause fire to come out of the firebox door. Now that is the only thing we have, and in view of the fact that the only evidence is to use, according to the plaintiff's case, evidence of improper use, there isn't any basis on which, in this case, a claim can be made that there was any violation of the Boiler Inspection Act, or that this locomotive specifically would have spit or exploded fire into the cab of this loco-

tive if the firebox door had been closed and latched. And as far as that is concerned, I am perfectly willing to submit that matter upon that statement.

Now the second matter, which I don't know whether it is [193] appropriate at this time or should be ruled on, but I want to renew again the offer of defendant's Exhibit A. That, your Honor may recall, is this form of application to observe the operation of locomotives, cars and trains. It is the one in which that——

The Court: Yes, I understand.

Mr. Dunne: You understand that. Now of course the question arises as to whether or not the provision as to assumption of risk would be valid. As I suggested to your Honor, if it is determined conclusively that this man was an employee and the Act applies, then that is obviously not good under Section 5.

The Court: I don't see that there is really any point to that, Mr. Dunne, because to admit it would require a holding that the Act does not apply, and if the Act does not apply, then of course the defendant is not liable. So isn't that the [194] situation?

Mr. Dunne: But isn't there a question of fact for the jury to determine whether this man was employed?

The Court: Well, if the jury decides that he was——

Mr. Dunne: Employed——

The Court: ——an employee, then this would not be applicable.

Mr. Dunne: That's right.

The Court: But if the jury decides that he was not an employee, then the verdict would have to be for the defendant.

Mr. Dunne: For the defendant anyway.

The Court: So I don't see how that——

Mr. Ryan: I don't think that is true, though, your Honor.

The Court: Beg pardon?

Mr. Ryan: I don't think that what your Honor says is true, that if the Act doesn't apply, the verdict would have to be for the defendant. I think that whether or not—of course, I contend that the Federal Employees Liability Act applies. But if he doesn't he is an invitee, and they have to use ordinary care.

The Court: But you can't maintain an action under the Federal Employers Liability Act, involving an invitee, because you have to have the employer-employee relationship under the Act. All that this judge did in the case that you cited was, he held that those facts amounted to an employee-employer relationship; the fact that there was a control by the employer [195] of the manner in which the employee or the plaintiff did what he did, and they got the benefit of it. He held that under those circumstances, an apprentice or student fireman was an employee, and therefore the Act applied.

Mr. Ryan: That is the case, yes; but I mean, even if he wasn't and just assume this for the sake of argument. Assume that he couldn't be classified

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Mr. Ryan: That is the case, yes; but I mean, even if he wasn't and just assume this for the sake of argument. Assume that he couldn't be classified

as an employee. Still, in all, while he was learning, the relationship of invitor and invitee would exist, and the invitor-invitee relationship would require ordinary care. It would be a case of common law negligence. The action, whether it was of an F. E. L. A. case or common law case is founded on negligence in either instance.

Mr. Dunne: The jurisdiction of this Court in this case isn't founded on that. The jurisdiction of this Court is founded only on the theory that this is a Federal Employers Liability case.

Mr. Ryan: It could be found on diversity of citizenship.

Mr. Dunne: But there is no allegation of that.

Mr. Ryan: Oh, yes, there is.

Mr. Dunne: It hasn't been founded on that.

Mr. Ryan: As a citizen of Delaware.

The Court: Yes, but you brought the action and said so in the complaint——

Mr. Ryan: Yes, I want to be brought into that act if I can, but I was just answering the statement your Honor made a moment [196] ago, that if he wasn't an employee, then the verdict would have to be for the defendant. I don't agree with that statement.

The Court: Why not?

Mr. Ryan: Because, as I said, if he was not an employee and if he was learning, learning his job, and they sent him up there in the first place, the relationship of invitor and invitee, under ordinary common law would exist. Then an invitor——

The Court: Well, under those conditions you couldn't rely on a Boiler Inspection Act.

Mr. Ryan: Oh, of course not. But I am talking about the second count.

The Court: No. 1. No. 2, you couldn't rely upon the Federal Employers Liability Act.

Mr. Ryan: No, but negligence would be the basis of the action, just as it would under the Federal Employers Liability Act. I mean, maybe this is a little academic, but——

The Court: Well, I don't think you could be permitted to go to judgment on a theory of common law negligence, because the case was brought here in this Court on the theory of the Federal Employers Liability statute.

Mr. Ryan: That is in extremis. I mean, if there was no other way, I could still have that to fall back on. But I don't think we need that in this case.

Mr. Dunne: What Mr. Ryan is saying—I want to point this out so there will be no misunderstanding about it—is that [197] if he has any intention of relying on common law negligence, is that this is admissible as an assumption of risk agreement, as a defense to any common law negligence, because the agreement is valid under the Francis case.

Mr. Ryan: Yes, but an assumption of risk can even, under common law, not apply—it wouldn't apply if the other side was guilty of negligence.

Mr. Dunne: Oh yes, that is the Francis case; United States Supreme Court has squarely passed on that.

The Court: Yes.

Mr. Ryan: I think this is academic, though.

The Court: But this case, in its present status, I can't hold that this is anything more than a Federal Employers Liability case.

Mr. Ryan: I am afraid that is an academic point that I raised.

The Court: If the plaintiff were not an employee, then the action fails. And if he was an employee, then under the Federal Employers Liability Act, Section 55, I think it is—45 USC 55, then this agreement would be invalid.

Mr. Dunne: That's right. If he were an employee. There is no question about that, your Honor.

Now then, in view of that, I offer separately and severally as a distinct offer, the heading on this document, the first paragraph, excepting the last word, "and," which indicates that [198] it carries on to something else. And then the last two lines, which is the place and the date, and then the line for the signature.

Now that is an independent order; if your Honor will look it, you can see it will bear specifically on this question of fact as to whether or not this man is an employee.

The Court (Examining): You say the last paragraph?

Mr. Ryan: No, just the first paragraph.

Mr. Dunne: Yes, the first paragraph, and then of course, enough to pick it up for the signature and the date.

The Court: Well, I don't think that dissecting the document in that way would amount or would have any meaning, or, inasmuch as there were other documents that were signed and are now in evidence, that fix the conditions and show the purpose of it, show the relationship between the plaintiff and the defendant——

Mr. Dunne: Well, those, I think not, your Honor; there are applications, and only in a remote sense. Now this is a document that is part of the same transaction. It bears on the relationship that the parties bore to each other. In other words, the circumstances under which he was on the premises. In his agreement to the provisions of that first paragraph, the least that can be said of them is that they are one item of fact.

The Court: That I don't agree with you on, but the paragraph has no meaning unless it is a whereas clause, unless it [199] is connected with the purpose and objective of this document, which is for the purpose of waiver of assumption of risk. I don't think you could take out of a document that is intended for that purpose something that applied for a different purpose.

Mr. Dunne: Well then, the whole thing ought to come in with an instruction from your Honor as to when the assumption of risk provision is good and when it is not good; because we can't dissect the facts. It is part of the facts.

The Court: Well, it seems to me that the interests of justice require that this document be not

admitted into evidence. I don't see that it serves any useful purpose, because as I say, it is determined that the plaintiff was covered by the Act, that the Act did apply—if that is determined, then the document itself wouldn't be invalid under Section 55 of the Act. And if, of course, it is determined that he was not an employee, and the Act doesn't apply, then the Court would have to instruct for a verdict for the defendant in the case, irrespective of Mr. Ryan's contention that he might still proceed in a common law action. So for that reason, I think——

Mr. Dunne: So there will be no mistake on the record as to my offer, I am offering it now both as a whole and as to that first paragraph, as a separate offer, as one of the items of fact going to show what the relationship between the plaintiff and the defendant was at the time he was in the roundhouse.

The Court: Yes, I understand the full purpose of the offer, [200] and I will hold that for neither purpose is the document admissible—neither in whole or in part.

Now what have you got say——

Mr. Dunne: I beg your pardon.

The Court: No, did you have another matter to present?

Mr. Dunne: Yes, I did.

The Court: Suppose you present that, then.

Mr. Dunne: I presented the matter as to the Boiler Inspection Act. Now the next is as to the Federal Employers Liability Act, and as to whether

or not the plaintiff has made a *prima facie* case for the application of that Act in either of the two necessary aspects: One, to show that he was an employee and the other to show that if an employee, then any part of his duties were in interstate commerce or in furtherance of interstate commerce.

Now first, for a non-suit or a dismissal as to that charge, or that claim, on the ground that there is no evidence that he was at any time an employee, or that he performed any service within the meaning of that Watkins case. And further amplifying that, that the only evidence in this record is that his instructions were to go around with the fire-lighters and keep his eyes open and see what he could. Then he departed from that and moved out, if he did anything at all under the jurisdiction, the unwarranted jurisdiction, the fireman who himself has testified now that he had no jurisdiction over student firemen around the [201] roundhouse. In other words, that this man departed from the thing that he was instructed to do. And on one of the instructions I have cited to your Honor just such a case. The facts were a little more extreme than in this case. That was the case of a student fireman who, instead of going up into the locomotive went back into the caboose and was in the caboose at the time he was killed in a rear-end collision. Recognizing the general rule that a student fireman performing services are employees, the Court held that it was only while they were

performing those services, and than when he departed, he lost that status as employee.

The Court: Wouldn't that be rather, though, technical in this case? Because it appears, not too clearly, perhaps even somewhat vaguely, in the evidence that the next step would have been for him to have ridden on the locomotive anyhow.

Mr. Dunne: In the yard, your Honor—in the yard; he would have gone out with a regular crew in the yard. Here he was getting on a locomotive moving around the roundhouse when he was still supposed to be doing his shift in the roundhouse, and to be with the firelighters. Now I concede, if your Honor please, that in many respects that may look like a somewhat technical distinction, and yet it is seizing on a highly technical conception of employment, if it be seized on at all, that counsel wants to bring themselves within Acts, No. 1, which deprive us of certain common law defenses, that deprive us of [202] the assumption of risk defense, the Federal Employers Liability Act applying; the Federal Employers Liability Act, applying, contributory negligence is only a defense in litigation. And if by any chance your Honor should say there was a question of fact under the Boiler Inspection Act, there is nothing more highly technical than the fact that we are brought under an Act where we are liable, if there is any defect in the locomotive, no matter how much care we exercise. In other words, these Acts impose such responsibility that unless the requirements of the Act

are laid out, I think we are entitled and justified in taking the position. This man, in other words, to take advantage of these Acts, has to bring himself within them, and he hasn't done it.

Now in addition to that, if your Honor please, and going to the same cause of action, I call your Honor's to the Rock case. There is a further ground; this man is not an employee within the meaning of the Act, because the Rock case applies. This man misrepresented to us facts with respect to his physical condition.

The Court: That is that Minnesota Railroad case?

Mr. Dunne: That's right, against Rock. Facts which would go directly to the matter of his physical condition, his physical fitness for the job as a fireman. And in this case, he has indicated himself that the injuries themselves had some relation to the very fact of the prior condition, because when he [203] went out to the window, he endeavored to save his left leg because he knew that he had an injured left leg. And while he doesn't say that he did it entirely, the fact is, he said, "Yes, consciously I was taking, I wanted to land on both feet, but I wanted to take it on my right leg, because I knew I had an injured left leg." So that it was a matter of fraud that he perpetrated. It was a fraud, that went to the essence of the employer-employee relationship. It was a fraud that deprived us of any choice of taking that kind of a man to be around a roundhouse, where things are

somewhat hazardous. And upon that ground I submit to your Honor that the Rock case applies.

Now your Honor, I think, is aware——

The Court: Wouldn't that be a question of fact for the jury, though? Wouldn't that be a question for the jury as to whether or not that was that type of fraud, and whether or not it had a casual relationship to the accident?

Mr. Dunne: Well, your Honor then is familiar with the other line of cases on that. Because as far as I know, the representations, cases of representation that go a man's physical condition, that they are related to his job, have followed the Rock case except where a man, whatever his condition—and they are usually age cases—has been taken on and has worked a long period of time and is then injured. The great majority of the cases which at least say that it is a question of fact, and then a question of casual relationship, are [204] those in which a man has misrepresented his age. There are those two lines of cases.

Now lastly, as to the application of the Federal Employers Liability Act, the motion is made upon the ground that there is no evidence in this case that anything that this man ever did, that any part of his duties, were in any way related to interstate commerce or the furtherance of interstate commerce. Now in the first place, the most that is shown is that Roseville itself is a terminal at which interstate traffic is handled. It is shown that he has done something around the roundhouse. It is not shown that he had the slightest contact with any power

that was ever used. Now I admit this is rather extreme, because this is the state of the record. It is not shown that he had any connection with any power that had ever been assigned to any job which ever handled any interstate traffic. [205]

The Court: Well, of course, Mr. Peterson testified that this engine was to be used in the bowman——

Mr. Dunne: Bowman turn.

The Court: Bowman turn movement, and of course under these Supreme Court decisions that we have now, why, apparently a Judge isn't expected to search very hard to find a connection between what any employee does in Interstate commerce.

Mr. Dunne: That is quite true.

The Court: Practically told not to make, devote a great deal of energy, by Judge Frankfurter in some of the decisions.

Mr. Dunne: That is true, they have gone quite far in that regard, but in addition to that this man is removed even farther, because there is no evidence that he actually performed any service, a service that he ever actually did, or did anything that was in furtherance of Interstate——

The Court: No doubt, Mr. Dunne, that—of course, he was not engaged in any service in the common acceptance of that term. The Judge in this Watkins case speaks of it as a service in the sense that the training and observation and so forth is part of the preparation of the fireman for duty and

in that sense that it is a service to the railroad company.

Mr. Dunne: I appreciate that there is some language [206] there——

The Court: Some reasoning——

Mr. Dunne: I appreciate there is some such language there, but I think if your Honor would look not only in that case, but the other cases, you will find that the man actually has performed no real service. Now, without looking at my notes, in the Watkins case, my recollection is that the Watkins case he was a yard——

The Court: He was a clerk.

Mr. Dunne: You see, in that case he had performed some actual service. He took the seals on the one side of the cars while the clerk took the seals on the other side of the cars. He actually relieved the clerk of performing that service in the course of learning.

The Court: The first time he had gone out, the clerk said you take this side and I will take this side, and that is when the accident happened.

Mr. Dunne: He actually relieved the clerk in that case.

The Court: It is one of these distinctions that is like the distinction between substance and procedure, sometimes very tenuous and very hard to draw the line. If he was just looking would he be performing a service? Supposing a man, a car inspector, standing off and just looking on. It is rather getting down to rather fine points.

Mr. Dunne: In other words, you have to find out what the [207] job calls for and what he was doing whether he was performing a service. Obviously, with an inspector merely looking he would be performing a service. This man——

The Court: He was learning.

Mr. Dunne: That is what he was doing in this case.

The Court: Except he had testified he had thrown the oil waste and in a couple of instances started the fire, gotten that far in the service, so while it is meager, I suppose it has to be decided on the principal.

Well, I think that the questions that you raise with respect to the second cause of action are practically all matters that the Court would have to submit to the jury, Mr. Dunne. That would be my feeling on that. I would like to hear from Mr. Ryan.

Mr. T. Ryan: Yes, I would like to say one word.

The Court: To see what he has to say about that boiler.

Mr. T. Ryan: I will come to that. If I might say one word that hasn't been mentioned here by either your Honor or Mr. Dunne on the Federal Employers count. This case is very, very similar to the case, that Watkins case. Your Honor will recall when the plaintiff got hurt in that case he had, it is true, gone down one line of cars, the regular clerk went down the other line of cars, they finished that work, then they went over to a shack to get some coffee or something, rest, or doing some-

thing, and the accident [208] happened when they were walking across the yard.

The Court: Happened in another place.

Mr. Ryan: Happened in another place while walking between two sets of cars.

Now, here is something very interesting to bear in mind showing that plaintiff comes within the Act as stated in the Watkins case. You know, under the 39 Amendment to the Act any part of his duties had to do with Interstate Commerce, then he comes within the Act. He doesn't have to be doing a job related to Interstate Commerce at the very moment of the accident. Now, your Honor will recall Libbey's testimony that during the day——

The Court: I don't think——

Mr. Ryan: He lit two fires——

The Court: I don't think we need to take time to argue that. I think that would be a question for the jury at the most.

Mr. Ryan: Very well. Now, your Honor, in regard to the Boiler Inspection Act, counsel didn't think it applied. The reason I wasn't worried about it as I am about another matter as to whether this Act applies or not, counsel stated we didn't show any particular defect in the locomotive. He said that the accident happened——

The Court: He said that, but that wasn't really the purport of Mr. Dunne's argument, though. He called attention [209] to the, I think it is Myers, other cases, where the brake does not function, that

you just show the brake doesn't work. That is sufficient. But here, there is nothing that was shown that had to do with the engine not working, except the fact that somebody left the door open and the fire came out. That has nothing to do with the serviceability of the engine.

Mr. Ryan: Well, here is my answer to that——

The Court: Any more than if a man drops some grease on the engine or does some other act.

Mr. Ryan: This Section 23, which is the Boiler Inspection Act, reads as follows:

Now, leaving that door open rendered the locomotive unsafe, "Without unnecessary peril to life and limb." That made that locomotive unsafe. For instance, in the case of *Lilly vs. The Grand Trunk Railroad*, they held, it went to the United States Supreme Court, held merely because snow fell on the locomotive that there was a violation of the Boiler Inspection Act. That locomotive could work 100 per cent both before and after the accident, but it was dangerous at the [210] moment because snow was on it. I say this is akin to that. This locomotive was dangerous because the door was left open.

Your Honor, that is not the point where I had my doubts. Where I thought the close question where the Act applied was this: The Act says that it only applies when the locomotive is used on the line of the company. In other words, for instance, the Boiler Inspection Act wouldn't apply to mere switching operations.

The Court: Mr. Dunne didn't make that point.

Mr. Ryan: I know, cases that hold that where an engine is being taken out of the roundhouse which is going to be coupled to a train in Interstate Commerce that the Boiler Inspection Act would apply, but my answer to the argument made by Mr. Dunne is that this engine was rendered unsafe because that door was left open. It is just as effectively unsafe as if there were no door there at all.

The Court: You haven't alleged that, you didn't charge that as an element of unsafeness in your complaint.

Mr. Ryan: In the first count——

The Court: No, you said it was unsafe because the fact that the engineer injected oil into it, as I remember it.

Mr. Ryan: Said firebox was in an improper condition and unsafe because oil could not be injected into it, into the said firebox without flashing back into the cab of the locomotive. [211]

The Court: You see, if the door was closed, it would have been a safe condition.

Mr. Ryan: When I get through with answering this argument I will make a motion to amend the complaint to conform to the proof.

The Court: I will allow that amendment, no question about that.

Mr. Ryan: I will say that engine was just as effectively unsafe under the Boiler Inspection Act as if there was no door. Doesn't leaving the door open render the engine unsafe? And no one would

question that the Boiler Inspection Act would apply if there was no door and this flashback came back and injured a man.

I say it is a question of degree only, but all you have to show under the Boiler Inspection Act is that the condition that existed rendered it unsafe for life and limb. This condition did render it unsafe for life and limb.

The Court: Of course, I don't think, Mr. Dunne, it makes very much difference in this case whether the Boiler Inspection cause of action is in or not. There is not as yet, unless something else is to be introduced, any real substance to any claim of contributory negligence except the fact that the young man jumped out of the cab, if that could be considered contributory negligence, and that that being so it doesn't make very much difference which cause of action is [212] proceeded on.

Mr. Dunne: Of course——

The Court: If the case is more substantial the jury would have to pass on——

Mr. Dunne: But there are a number of things, if the case is submitted to the jury, and your Honor has seen it already in the instructions, instructions have to be guarded, they have to be chopped off, they have to be conditioned. We have that. It is not presented to the jury in as easy and clean a way. Your Honor would have to, of course, give the other instructions anyway. Nothing occurs to me as to the difference between the two except on the question of contributory negligence, but it does

make a difference and if the Act doesn't apply I shouldn't have to be bothered with making arguments before I can argue the conduct of the man himself.

Now, certainly there is a remarkable distinction between a locomotive that is defective and a locomotive that is not defective and misused.

The Court: Of course, Mr. Ryan argues it is just as effective as if there were no door. There is some merit to that.

Mr. Dunne: Except this, if your Honor please: There is a marked distinction between an employer who has employed his mechanics, employed his inspectors, gotten his locomotive in perfect shape, and then as it was mishandled by a hostler [213] and an employer who says, "Go ahead and use that locomotive," when he knows it doesn't have a door on it.

I think your Honor will find cases straight through which made a marked distinction between defective equipment and misuse of equipment that is not defective. [214]

The Court: Well, if this were a case that was going to stand or fall on that Boiler Inspection Act I think I would be inclined to give further consideration to it, but at the moment I don't see that there is any real need to give that any further attention. I might be even inclined to suggest to the jury if I were submitting the case at this point, which is the point I have to decide these motions, I would be inclined to say to the jury there isn't

very much substance to any claim of contributory negligence, unless, as I say, the jumping out of the cab window by this young man might be considered as such, and under those circumstances I don't see any great importance to the motion at this stage of the case. It may be that there might be at the end of the case, I don't know.

I think—have you got some witnesses here this afternoon that can go on?

Mr. Dunne: Of course, that is the question I now have to debate. If this motion is denied, then the questions I have to resolve is whether to call any witnesses as to the condition of this locomotive.

The Court: You would have to do that under any condition.

Mr. Dunne: What?

The Court: I say, you would have to do that under any condition.

Mr. Dunne: No, if the—— [215]

The Court: If the boiler inspection cause of action was thrown out?

Mr. Dunne: I am pretty close to the point of being ready to submit the case. I have one or two things that I would have to do. I am not going to argue about what happened on this particular occasion; no particular question about that. I am not going to claim these rules counsel has read here were not in effect. I am not going—I don't see how I can possibly argue to this jury with a straight face that these rules weren't violated. It seems to me they are perfectly plain.

The Court: I think that in fairness at this stage of the case that I should deny the motions. If you feel it is necessary to put on some evidence on that score and you haven't got it here now you can put it on in the morning.

Mr. Dunne: Well, I would like to do that and give consideration to it, suggesting to your Honor on further consideration and on checking the record I may conclude at that phase of the case and to submit it at that point. However, there are one or two things that I can put in this afternoon.

Now, possibly counsel will have some objection to them, but I think that as long as the jury isn't here I might indicate what they are.

The Court: All right. So the record will be clear, the Court will deny the motion to dismiss both causes of action. [216]

Mr. Ryan: Your Honor, I want to make a motion to amend my complaint to conform to the proof, to change the allegations where I said oil was injected into the boiler and to allege negligence in operating the engine with the door open and I will prepare one in writing.

Mr. Dunne: Not necessary to do that. I will make no point at any stage of the proceedings that the evidence that has come in is not within the issues and I will make no point that that issue cannot be passed upon by the jury. I am perfectly satisfied I was not taken by surprise, and we know what happened, and the witness has testified substantially in that regard what I expected him to testify.

Mr. Ryan: Very well.

Mr. Dunne: So that it may be before the Court I want to offer two official publications, one by the United States Government which outlines the Federal Vocational Rehabilitation Service, and the other, a very short one, published by the California State Department of Education, Bureau of Vocational Rehabilitation. They are very short and they are in the form of general statements as to what those services—I don't intend to read them to the jury, but I want them for a foundation for making an argument to the jury as to the facilities open to this young man.

Mr. Ryan: I would make two objections to them. Number one, they are hearsay as to the plaintiff, and number two, [217] they are incompetent, irrelevant and immaterial at this point for this reason: that the evidence conclusively shows that the plaintiff is still undergoing treatment at the Southern Pacific General Hospital, he is not at the point yet up to this period of time that he should go out and try to get vocational rehabilitation.

The Court: I don't think much of that argument. Your own doctor said his state is permanent so far as he can see and nothing more that could be done.

Mr. Ryan: That is true, up to this moment. If you're arguing in the past he should have done it, he is still under medical——

The Court: He is not asking——

Mr. Dunne: Not as to the past.

The Court: That is not Mr. Dunne's point.

Mr. Ryan: As to the future?

The Court: That is right.

Mr. Ryan: Well, let's see——

Mr. Dunne: What is open to this young man.

Mr. Ryan: Well, I object then on the ground it is hearsay. I cannot cross-examine these documents, can't bring out all the facts.

The Court: I suppose it is hearsay.

Mr. Dunne: Except the fact that they are official government representations as to what that [218] service is.

The Court: I think that there has been enough said on the subject to allow counsel to make a fair comment to the jury as to the nature of this service and that there is that opportunity.

Mr. Ryan: I agree with that.

The Court: That the Government maintains services for that purpose. I think that would be perfectly fair comment to make to the jury without the documents.

Mr. Ryan: I think he got that from Dr. Guter-man, I mean, all those things.

Mr. Dunne: So we shan't get into a snarl, won't ask that they be marked—I will ask in that regard to amplify that, that the Court take judicial notice in order that I may comment on the statutes which set up the services.

Mr. Ryan: Under which the services are set up?

The Court: Very well, the Court takes judicial notice of those statutes.

Mr. Dunne: I think that is all I have at the

moment. I will have two rules. I will call counsel's attention to them; one of which bears on this matter of employment, and the other which bears——

The Court: Hadn't you better present that when the jury is here?

Mr. Dunne: Yes, I want to do that, but simply want to ask Mr. Ryan, I assume he will give me the accommodation, if [219] I can read them, if otherwise relevant, Rule 864 of the Transportation Rules, that is, unauthorized persons not to be allowed on moving locomotives.

Mr. Ryan: I don't know it offhand.

Mr. Dunne: You don't want me to bring a witness to prove that——

Mr. Ryan: Absolutely not. I have a book.

Mr. Dunne: And the same thing, I think it is Section 6 or 16 or Article 51 of the Firemen's agreement.

Mr. Ryan: Article 51, got it here?

Mr. Dunne: Yes. It is the 90-day provision. There is a provision under the Fireman's Agreement, if your Honor please, that once these men have passed, taken all their student trips and otherwise qualified, they are hired and go on pay, and then thereafter, Section 16, there is a 90-day period in which we may terminate their services without cause for any reason, and if we don't do it within that 90-day period, then we can terminate only for cause and under the provisions of the Act. I offer it to show that there are three gradations in this matter of permanent employment, the student

status, whatever that may be, temporary status, 90 days, and then permanent status. It is a matter, I think, which probably dresses itself more to your Honor than to the jury. As a practical matter that is what the section is, the Firemen's Agreement. I just wanted to know whether counsel wanted me to [220] call a witness.

Mr. Ryan: You won't have to call anybody to identify, I will admit the Agreement, but still reserve my right——

Mr. Dunne: That is right.

The Court: Now, you wish to call any—have you got someone you wish to put on the witness stand?

Mr. Dunne: I prefer to go on tomorrow morning, your Honor, if I may.

The Court: How much time do you think—can it go to the jury tomorrow, that is what I would like to know.

Mr. Dunne: Tomorrow afternoon?

Mr. Ryan: I think we could complete the argument tomorrow.

Mr. Dunne: Not if I call witnesses on the condition of the locomotive.

The Court: That is all right, you could probably use the morning in testimony, you think?

Mr. Ryan: I will enter into a stipulation to speed that up. I would be willing to admit that if you called the master mechanic—I see you have Mr. Weiste here, I know more or less what his testimony——

Mr. Dunne: I have the foreman.

Mr. Ryan: And the roundhouse foreman, that the only defect——

Mr. Dunne: Put it this way: You only claim a defect under the Boiler Inspection Act in that the door was not [221] closed?

Mr. Ryan: Let me see, I was thinking—I think you have my answer about these explosions and these flare-backs——

The Court: Of course, that is all the evidence was so far.

Mr. Ryan: Yes.

The Court: Nothing to indicate had the door been closed that these flames and smoke would have gotten into the cab.

Mr. Ryan: Yes. I will admit that the only thing defective or unsafe, in the language——

Mr. Dunne: I don't care how——

Mr. Ryan: Is the keeping of the door open, when the thing is being operated.

Mr. Dunne: That stipulation, then, I would not call anybody, your Honor, please. Probably one witness to call in the morning.

The Court: Would that be long?

Mr. Dunne: No, I think not.

Mr. Ryan: The roundhouse foreman?

Mr. Dunne: Yes, your Honor, if I call him, I think his testimony would not take over a half hour.

The Court: Argue the matter in the morning then?

Mr. Dunne: Yes.

Mr. Ryan: Argue in the morning 10 to 10:30,

at least partially argue it. I imagine the last argument would go into [222] the afternoon.

The Court: How much time to argue?

Mr. Dunne: Not a great deal, I don't think; hardly a disputed fact in this case.

Mr. Ryan: Most things are admitted.

The Court: Have you got that witness here today?

Mr. Dunne: No, your Honor, I have not.

Mr. Ryan: How about a half hour?

The Court: Well, I was just a little premature. I think perhaps I better bring the jury in and enter into the stipulation in front of the jury you just made, and then I will dismiss the jury for the day.

Mr. Dunne: Now, how about that Rule 864?

Mr. Ryan: Do you have it with you?

Mr. Dunne: Yes.

Mr. Ryan: Oh, I am going to make an objection. Trying to read this afternoon?

Mr. Dunne: Whenever——

Mr. Ryan: For instance, want to object to this latter sentence, latter part of it says——

The Court: What are you reading, so the record is clear?

Mr. Ryan: Reading now from the Firemen's Agreement that counsel handed me.

The Court: What section? [223]

Mr. Ryan: Section——

Mr. Dunne: 16 of Article 51.

Mr. Ryan: Of Article 51. The last sentence reads as follows:

“When applicant is not notified to the contrary within the time stated, it will be understood that the applicant becomes an accepted employee, but this rule shall not operate to prevent the removal from service of such applicant, if subsequent to the expiration of 90 days it is found that information given by him in his application is false.”

Now, I am going to object to that on the ground that it is incompetent, irrelevant and immaterial and self-serving on several grounds. Number one, he was not a fireman at the time this accident happened, he was a student fireman, and the agreement wouldn't even begin to cover him until such time as he had passed the examination and been accepted by the company as a fireman. Secondly, I say that it is, further, that information given by him in his application is false, even under the law and even under that agreement they couldn't fire him unless that was a material allegation, and I submit that after their own company doctor had accepted him and passed him with knowledge of his injuries and knowledge of his compound fracture in the other leg they would waive any such finding. [224]

The Court: Mr. Dunne, how is the provision of the Firemen's Agreement applicable here? Does it specifically say that it applies to student firemen?

Mr. Dunne: As a matter of fact, your Honor, it does not. The Firemen's Agreement does not apply to student firemen. There have been all sorts of discussions before all sorts of bodies about that,

but it does not. At this time I am not offering it for what counsel seems to be bothered with, I am offering it for the purpose of showing that between a student fireman and a permanent employee there is still an intermediate stage of temporary employment and I say to your Honor that I am calling attention to the existence of this rule because it has—attention has been called to it in some of the cases that have distinguished this question of fraud and have indicated that the man, even though he has passed beyond that 90-day period, that they had——

The Court: The company still has the right to——

Mr. Dunne: That is right.

The Court: Not to complete his employment?

Mr. Dunne: That is right.

The Court: On that ground.

Mr. Dunne: And it is in connection with that that I am offering the rule. [225]

Mr. Ryan: I will object on the ground it doesn't apply to the plaintiff in this case because he was not a fireman and not a party to the agreement.

The Court: I think that the precise provision in this agreement would be subject to Mr. Ryan's objection. The subject matter that you are discussing, however, might be presented in some manner to the jury, but I don't think this rule, that it would be competent to read the rule and agreement that is not applicable.

Mr. Dunne: May Mr. Ryan's reading of the rule be taken as my offer of the rule, then?

The Court: Yes, I will sustain the objection.

Mr. Dunne: 864.

Mr. Ryan: The other one. Well, I am going to object to this rule being read on the ground it is not applicable.

The Court: What rule are you referring to?

Mr. Ryan: Referring to Rule 864 of the Rules and Regulations of the Transportation Department. It reads as follows:

“Persons must not be permitted to ride on an engine or in a baggage, mail or express car without a written order from the proper authority, except employees in the discharge of their duties and those holding transportation endorsed to that effect.”

I submit that is used to keep tramps and unauthorized [226] persons, outside people off the engines and——

Mr. Dunne: Student firemen in the roundhouse.

Mr. Ryan: “Except employees in the discharge of their duties.”

Now, under the Watkins case it holds that the student fireman, while observing, is in the discharge of his duties and that’s what Mr. Libbey was on that engine 4, because he testified that——

The Court: I don’t think you need to labor that. I am inclined to think that the rule is not pertinent, Mr. Dunne, to this matter, because the relationship—it is clear from the document and testimony that that is what the young man was there for, to

make observation. He had to do that by getting on the engine.

Mr. Ryan: Had to do that to light the fires and watch the fire lighters.

Mr. Dunne: I want to make the record clear that our point is that the only evidence in this case is that he was instructed to accompany fire lighters. He had no instructions of any kind to ride on a moving locomotive. There was no evidence that fire lighters ever are on moving locomotives or have any function on moving locomotives. Our position is that until he had finished his two turns in the roundhouse, his only function was to accompany the fire lighters as told and he was going outside of the scope of his instructions, duties, [227] or whatever they may be called, when he got on to an engine to watch an engine to be moved.

Mr. Ryan: The answer is that Libbey's testimony where he said the roundhouse foreman Farrell had told him as follows, and I quote:

“Keep your eyes and ears open and learn everything you can about being a fireman.”

One thing he had to learn about, being a fireman, was how his engine was operated, because indeed it is firemen who act as hostlers in movements.

The Court: Well, I don't think you need to labor the point. I personally doubt that it would have any pertinency here. It is obviously intended to cover other situations than that of a person learning to be a fireman. In and of itself the presence

of the young man as an observer on the engine certainly is innocuous, no matter what stage of the proceeding, of his learning. I would rather think that would be a forced and unfair interpretation.

Mr. Dunne: Of course, it is also a restriction on any authority, any invitation from Petersen offering it in that connection, too.

The Court: I will sustain the objection to that. It has been read into evidence so that——

Mr. Dunne: It has been read in the record.

The Court: Read in the record. [228]

Mr. Dunne: May that reading serve as my offer?

The Court: That may serve as your offer, and I will sustain the objection.

Bring the jury in, Mr. Jones. I will dismiss them for the day, and tomorrow morning we will hear your remaining witness.

Mr. Dunne: I think it will be quite short, your Honor.

The Court: Very well.

Mr. Dunne: I want to amend one instruction, I am not sure I have got all the elements in that.

The Court: Like to take it back?

Mr. Dunne: I would rather leave it and hand the Court a new one. I think it is No. 40.

The Court: No. 40.

Mr. Dunne: It omits the element that we relied on representation. I think to be safe that should be in there.

The Court: Well, would you want to submit something more?

Mr. Dunne: Yes, I will bring it to you in the morning.

(The following proceedings were had in the presence of the jury.)

The Court: Members of the jury, we have been engaged in some discussions of law which I think have resulted in materially shortening the case, although it required you to remain outside and engage in forced conversation with one [229] another for a longer than usual period.

We won't need the jury any more today, and so you will be dismissed a little bit early and we will resume tomorrow morning at ten o'clock. The way the case now shapes itself up the case will be put in your hands for decision some time tomorrow.

Now, I notice that you didn't seem to like that, what is the matter?

A Juror: I have no likes or dislikes, absolutely neutral.

The Court: You indicated that you thought maybe we should have gone on today or something like that?

A Juror: Oh, no.

The Court: Then I misinterpreted it.

All right, members of the jury, please return tomorrow morning at ten o'clock and bear in mind the admonition of the Court.

(Thereupon an adjournment was taken until Wednesday, July 11th, 1951, at 10 o'clock a.m.)

Certificate of Reporter

I (We) Official Reporter(s) and Official Reporter(s) pro tem, certify that the foregoing transcript of 230 pages is a true and correct transcript of the record therein contained as reported by me (us) and thereon reduced to typewriting; to the best of my (our) ability.

/s/ [Illegible]

/s/ R. D. NORTON. [230]

Wednesday, July 11, 1951

The Clerk: Libbey vs. Southern Pacific Company, further trial.

Mr. T. Ryan: Ready, your Honor.

Mr. Dunne: Ready.

The Clerk: Juror No. 10 is absent, sir.

The Court: That is Mrs. Anderson. Juror No. 10 has not arrived. What do you want to do, counsel, wish to proceed with eleven jurors, or wish to make an effort to find out what has happened?

Mr. T. Ryan: Your Honor, as far as the plaintiff is concerned, rather than delay this trial right at the very end of it, I would just as soon go ahead with eleven jurors.

The Court: What do you say?

Mr. Dunne: I would like to make an effort to find out what the reason is, whether it is something of only a matter of a few minutes.

The Court: The Clerk will have to go upstairs

and try to find out on the telephone. He advises me she lives in San Bruno and may have some transportation difficulty.

Mr. Dunne: That's right.

The Court: Well, we will take a brief recess, the Clerk will try to ascertain the reason.

The jurors may remain in the box. [232]

(Short recess.)

(After recess, all Jurors being in the box, the following proceedings were had.)

The Court: Proceed.

Mr. T. Ryan: May it please your Honor, if I may interrupt at this time in order to further simplify the issues in this case, the plaintiff hereby dismisses the count based upon the violation of the Boiler Inspection Act, so this goes to the jury on the simple issue of negligence.

Mr. Dunne: Then that makes it unnecessary for us to state the stipulation that was entered into yesterday.

Mr. T. Ryan: That is right.

Mr. Dunne: Dr. Cress.

WALTER WILLIAM CRESS

called as a witness on behalf of the defendant, sworn:

The Clerk: Please state your full name to the Court and to the jury?

A. Dr. Walter William Cress.

(Testimony of Walter William Cress.)

Direct Examination

By Mr. Dunne:

Q. Doctor, you are a duly licensed physician and surgeon, licensed to practice as such in the State of California? A. Yes, sir.

Q. And how long have you been so licensed, Doctor? A. Thirty-eight years. [233]

Q. Where are you now practicing your profession? A. Sacramento, California.

Q. And how long have you practiced it there?

A. Twenty-seven years.

Q. Do you have some connection with the Southern Pacific Company? A. I do, sir.

Q. And what is that connection, Doctor?

A. I am division surgeon of the Sacramento Division and the examining surgeon for that Division.

Q. And what are the functions of an examining surgeon?

A. Well, we examine all employees in the City of Sacramento in the shops.

Q. That is, applicants for employment?

A. Applicants for employment.

Q. I want to call your attention to a young man who is sitting in the Courtroom here inside the rail, Mr. Libbey. As you look at him, do you recognize him; do you have any personal recollection of him?

A. No, I can't. I examine about twenty or thirty a day and I don't recall him.

Q. Doctor, we have here a record, a writing, which is defendant's Exhibit C in this case. Let me

(Testimony of Walter William Cress.)

show it to you and ask you first just generally as to it, if you recognize that form of paper, if you have seen that type of record before? [234]

A. Yes, sir.

Q. And generally what is it?

A. Well, it is a record of the applicant's examination, physical examination and his answers to the employing officer.

Q. Now, upon what is the second, the third, and the fourth page of that there is some printed material and there is some material in longhand writing, ink writing. Do you recognize that ink writing?

A. Yes, sir.

Q. Whose is it?

A. It is mine.

Q. I want to call your attention particularly to the second page and to this printed part it says: "Skin; scars, ulcers, excessive perspiration, and Vaso-Motor Tone." And under that there is some longhand writing. Whose writing is that?

A. That is mine, sir.

Q. Would you read what is there?

A. "Multiple scars left thigh and slight deformity of left thigh. Result of compound fracture of the femur during early childhood."

Q. Now, Doctor, with respect to that particular writing there, except as the writing itself may refresh your recollection do you have any personal recollection of the incident when you wrote that down? [235]

Mr. T. Ryan: I will object to that on the ground that that calls for the conclusion of the witness in view of his earlier statement that he has no personal

(Testimony of Walter William Cress.)

recollection of Mr. Libbey going there, and also an attempt to impeach what his own witness said in that respect.

The Court: I don't think there is any merit to that. Overruled. He may answer.

A. I don't recall, of course, making this entry here.

Q. (By Mr. Dunne): I am asking you if you, as a matter of your own recollection, with all the cases that you see, if you have any recollection of that particular——

A. Oh, no, sir.

Q. Doctor, with regard to those matters and the way those things are made out, I would like you to tell the jury what the normal routine is, how these things come about and what is done in the normal course of routine?

A. The examination, sir?

Q. Yes.

A. Well, of course, I usually refer to page one, which is the applicant's answers as to what diseases or injuries he has had, and then, of course, after examination I make these entries into this page 2, part 2 of this examination, take his blood pressure. The nurse, my assistant, who is my office nurse, has taken the vision and the hearing, and I do the physical examination part. [236]

Q. I want to call your attention to that particular entry that you read there, Doctor, and ask you whether or not in the course of making out any of these reports you have any recollection of ever having put down an untruthful statement?

(Testimony of Walter William Cress.)

Mr. T. Ryan: Just a moment, I object to that on the ground that it calls for a self-serving declaration on the part of the doctor on the ground that on other matters not connected it is incompetent.

The Court: The form of the question is—the form of the question is, I think, subject to objection. The subject matter may not be, but the form of the question is objectionable. Objection will be sustained.

Q. (By Mr. Dunne): Put it this way, then: Doctor, those matters, or those records are made by you in the course of the ordinary routine of examining these men, are they not?

A. Yes, sir.

Q. And in that ordinary practice, as matters of actual practice, are those records made by you yourself insofar as you make the accurate records?

A. Yes, sir.

Mr. T. Ryan: I move to strike his answer, I object to it on the ground that it is a self-serving speculation.

The Court: Yes, the objection is good, the manner in which it is done, the conclusion as to whether it is truthful or not, that is a conclusion. [237]

Mr. Dunne: What I am asking is a question obviously the Doctor has no personal recollection——

The Court: You may ask, of course, how he gets the information.

Mr. Dunne: That is right.

The Court: But not a conclusion as to whether or not it is accurate.

(Testimony of Walter William Cress.)

Mr. Dunne: Well, I am going to suggest in that regard——

The Court: That would be, of course, a matter of——

Mr. Dunne: Same foundation, lay the same foundation that is laid in the case of books of account and so forth, that in the ordinary course of routine they are kept accurately.

Q. Doctor, aside from the matters that you enter in your record, following his Honor's suggestion, that you enter in your record matters that are there, aside from what you yourself can observe, where do you get the information that is put down on that record?

A. Where do we get the information?

Q. Yes.

A. From the applicant.

Q. From the applicant himself. Do you have, in making those records, Doctor, a regular routine of making notations of men who have service connected disabilities?

Mr. Ryan: Object to that on the ground that it is incompetent, irrelevant and immaterial what he does in the ordinary [238] case. The question is what he did in this particular case, because he might have a rule and vary from it.

The Court: Yes, that may be true, but that would go to the weight of the testimony rather than to its admissibility. Overrule the objection.

Mr. Dunne: May I have the question?

(Question read by the Reporter.)

(Testimony of Walter William Cress.)

A. I do.

Q. (By Mr. Dunne): And what is that routine, Doctor?

Mr. Ryan: May my objection go to the line of questioning without repeating?

The Court: If you are objecting to this question I will overrule it.

Mr. T. Ryan: Yes, on the same grounds as before.

Q. (By Mr. Dunne): What is that routine, Doctor?

A. Well, if they are servicemen I usually attempt to ascertain if they have had any injuries or disabilities while in the service. And if they have, what the percentage of disability rating they have. It gives me an idea as to whether we should accept them or not, and a man who has one hundred per cent disability rating we frequently reject him.

Q. And in the course of that routine if you find that there has been a service-connected disability with a rating, is it ordinary routine to enter it on the record? A. Yes. [239]

Mr. T. Ryan: Objected to on the ground that it is leading.

Q. (By Mr. Dunne): Now, Doctor, you have been doing this work for a great many years, have you not? A. About twenty-eight years.

Q. I want to assume this: I want to assume that in 1950, in August of 1950, a man came to you who is applying for employment as a fireman and that at

(Testimony of Walter William Cress.)

that time he had a disability service-connected as the result of a war wound, a piece of shrapnel having gone into his left leg at about the middle third, resulted in a fracture of the femur; that he had been hospitalized for that for something over a year; that it had healed with a slight deformity; that it had left him with scars; that it had left him with a slight restriction of motion of the left hip; that it had left him with a slight restriction of motion of the left ankle; that it had left him with a restriction of motion of the left knee; that thereafter he had fallen and fractured the patella of the left knee, the left kneecap, and had been hospitalized for that; and that in 1950 he was suffering from restriction of motion of his left knee so that he didn't have full bending of it, and some atrophy of the left leg and a slight restriction of motion in the hip and in the left ankle; that that was, the injury had been received in 1943, there had been a long recuperation, something over a year of hospitalization, and then some gradual improvement in [240] the condition.

Now, examining a man for a fireman, if you had known those facts, would you have passed that man for a fireman?

Mr. T. Ryan: Just a moment. I make two objections to that: Number 1, that he is asking for a self-serving declaration on the part of one of their defendants, he is attempting to impeach the Doctor's own medical examination of the man, knowing about the fracture and observing with his own eyes the

(Testimony of Walter William Cress.)

wounds made by the shrapnel; secondly, and entirely aside from that objection, as a second objection, as far as the hypothetical question is concerned, I object to it on the ground that he has left out some very vital factors which would have affected the doctor's medical decision, to wit: That the man had improved to such an extent that the United States Government, through the Veterans Administration, had reduced his disability from 70 per cent to 35 per cent to 10 per cent and he had only had a 10 per cent disability at the time of this physical examination whereby he was getting \$15 a month from the Government; and thirdly, he left out this vital factor which would play an important part in the doctor's opinion, the fact that the man, prior to seeking to employment with the Southern Pacific Company, had been doing hard physical labor in the nature of working eight hours a day digging ditches with a pick and shovel; that he had worked in a logging camp doing heavy work, that he had done stevedore work in the nature of [241] loading and unloading cargo from both freight cars and boats, and that he had worked both as a wiper in the engine room of vessels where he was required to work in very cramped quarters and that he had worked as an ordinary seaman on vessels, and that he was able to walk with the disability in that left leg as much as seven miles a day.

Mr. Dunne: I will add those factors to the question.

(Testimony of Walter William Cress.)

Q. Doctor, did you hear what Mr. Ryan said?

A. Yes, sir.

Q. I will add those, too, to the factors he has accurately stated what some of the testimony is on that regard, take all those factors into consideration and with it in mind that this man, applying for the job of fireman, would you have passed that man?

Mr. T. Ryan: Just a moment. I have my other objection, the first one, which was apart from the second one, that it calls for a self-serving declaration on the part of the Southern Pacific Company, and also an attempt to impeach his own physical examination which shows on the face of it that he saw the injury that the man had and knew of his compound fracture.

The Court: Well, I think that this is not the field, Mr. Dunne, for the expert testimony. The casual relation of this man to the employment is a factual question for the jury to decide. I don't see that it is possible for expert testimony on the part of the examining doctor; it would result in opinion and a [242] conclusion which would be self-serving and would decide the matter rather than leaving it as a question of fact.

I will sustain the objection.

Mr. Dunne: Respectfully note the exception.

Q. Now, Doctor, assuming that same set of facts—if your Honor please, I don't want to persist after your Honor has made the ruling, but I do want to make a record.

(Testimony of Walter William Cress.)

The Court: Yes.

Mr. Dunne: And there is, although the objection hasn't been put on the ground—I would like to put another question on that same set of facts.

Mr. T. Ryan: Your Honor, ask the witness to wait until I make the objection, then, before he answers?

The Court: All right.

Q. (By Mr. Dunne): Now, Doctor, I want to assume that same set of facts and on that same set of facts put this question to you: Would such a man meet the standards of physical condition that were set for acceptance as a student fireman and for employment as a fireman?

Mr. T. Ryan: Just a moment, object to that on the ground that that calls for the conclusion and opinion of the witness and calls for a self-serving declaration and also serves as an attempt to impeach his own medical examination when he had that information about his injuries, and thirdly, on the ground that the answer would usurp the province of the jury in this case. [243]

The Court: Well, for the same reasons I will sustain the objection.

Mr. Dunne: I have no further questions.

I want, in this connection, if your Honor please, to make an offer of proof. Of course normally I should do it with the witness on the stand. I assume it would not be proper to make it in the presence of the jury, but I offer to make the offer now and at the appropriate time I will enlarge on it.

(Testimony of Walter William Cress.)

The Court: You may do that. I don't think it is necessary to preserve your record, because it is in the nature of questions.

Mr. Dunne: I think that is perhaps true, but I would like to complete the record.

Cross-Examination

By Mr. T. Ryan:

Q. Doctor, you say that you are division surgeon for the Sacramento Division of the Southern Pacific Company? A. Yes, sir.

Q. And also examining surgeon for the Southern Pacific Company, is that right? A. Yes, sir.

Q. Now, how long have you been employed by the Southern Pacific Company?

A. Approximately 28 years. [244]

Q. Now, when I say "employed" do you get a regular salary from the Southern Pacific Company?

A. Yes, sir.

Q. Is that a monthly salary? A. Yes, sir.

Q. And have you been getting that for 28 years?

A. Yes, sir.

Q. Now, you say that you examined some twenty to thirty men a day on an average for the railroad?

A. Yes, sir.

Q. How long do you usually take in one of these examinations?

A. Well, as I say, the office nurse does part of the examination. I should say it takes us about an average of twenty minutes per person.

(Testimony of Walter William Cress.)

Q. Yes. You make a pretty thorough examination? A. Yes, sir.

Q. I notice from your record there you examined all parts of the body from the head to the feet, don't you? A. Yes, sir.

Q. And you stripped the man so you can see what he looks like?

A. Not entirely. We strip them so we can get a pretty good idea of their physical condition.

Q. I mean you examine all parts of his body don't you? A. Yes, sir. [245]

Q. And you examine all his organs, too; I notice you examine heart, lungs, liver, kidney, and so forth? A. Yes.

Q. Yes. Take the blood pressure?

A. Yes, sir.

Q. Incidentally, for a man 26 or 27 years of age, would a blood pressure of 110 over 76 be normal? A. Yes, sir.

Q. That would indicate that as far as his circulatory system was concerned, he was in pretty good health, wouldn't it?

A. His blood pressure was all right, yes, sir?

Q. Yes. And if his heart and arteries were negative that would mean they were normal?

A. Yes, sir.

Q. And if his lungs were negative, that would mean they were normal?

A. Not necessarily. Of course, you understand this is not a complete examination.

Q. Well——

(Testimony of Walter William Cress.)

A. Frequently overlook things, you know.

Q. Well——

A. It is a crude examination at the best. It is—we don't use an x-ray for the lungs, or only in certain employees do we use the x-ray.

Q. Let me put it this way: If you wrote down in your ink [246] handwriting that the lungs were negative, that means as far as you are concerned, it was normal? A. That is right.

Q. When you say abdominal area, which would include scars, hernia or masses, would mean that he had none of those things?

A. None that we found.

Q. And you looked for them, right?

A. Yes.

Q. And when you say that his genital-urinary tract were negative, that would mean as far as your examination was concerned, that area of his body was normal? A. That's right.

Q. Now, under the heading of skin, scars, ulcers, excessive perspiration and Vaso-Motor Tone, you wrote down: "Multiple scars of the left thigh." Stop there a moment. Of course, not having any recollection at the present time of Mr. Libbey, you don't recall where on his left thigh those scars were, do you? A. No, sir.

Q. And you have no recollection as to whether there was such a wound that would enter in one part of his leg and come out the other; you don't remember that do you? A. No, sir.

(Testimony of Walter William Cress.)

Q. And then when you write down here that he had a slight deformity of the left thigh, can you tell us now what that [247] deformity was that you found in his left thigh? A. No, sir.

Q. You don't remember that at all, right?

A. No, sir.

Q. Now, then, when you say that this—these scars of the left thigh and this deformity of the left thigh was the result of a compound fracture of the femur, you don't recall now what part of the femur that compound fracture was of, do you?

A. About the middle third.

Q. You remember that?

A. No, I don't remember it, no, sir.

Q. Why do you say that, the middle third?

A. Well, I——

Q. Here is what you wrote, show you the paper. Is there anything there to indicate what part of the femur it was? A. No, sir.

Q. All right. And you don't recall?

A. No, I don't recall.

Q. You, however, when you wrote down on this report that he had a compound fracture of the femur, you mean that the big bone between the knee and the hip actually broke through the skin at one time or another?

A. The skin was broken with the bone exposed, yes, sir.

Q. So you knew then when you accepted his application, which you did, did you not? I show you

(Testimony of Walter William Cress.)

part 3, "Is applicant [248] accepted, rejected, or referred?", and you encircled "accepted"?

A. That is right.

Q. That means he was accepted after you knew he had suffered a compound fracture, is that right?

A. That's right.

Q. And also after you knew that he had such a compound fracture with these wounds, entering one part of the leg and coming out the other, correct?

A. Correct.

Mr. T. Ryan: That is all, Doctor.

Redirect Examination

By Mr. Dunne:

Q. Of course, that only takes up part of what you knew, Doctor, so let's take that entry and read the rest of it, follow the line of questions that Mr. Ryan put to you, "Resulting compound fracture femur during early childhood." That would also indicate to you that whatever this condition was he had overcome it and had gone through a good many years of it without it bothering him?

A. That's right.

Q. And if you had such a history, Doctor, having found out that a man had had a compound fracture of the femur in early childhood and had learned then that after that he had been accepted by the Marines, served with the Marines on active duty in a combat area, would such a history affect your

(Testimony of Walter William Cress.)

opinion as to the results of any such fracture in early [249] childhood?

Mr. T. Ryan: Object on the grounds that it calls for the opinion and conclusion of the witness, as a self-serving declaration on his part, attempting to go against his own observations of the man in his physical examination, and on the ground that it usurps the province of the jury, speculative, and also not proper redirect.

The Court: Well, I still think, Mr. Dunne, that is a jury question, rather than an opinion testimony of the witness as an expert as to his opinion. It is for someone else to say that was of the nature that would affect his opinion rather than for him to say, because at best it could, it would only be in the hypothetical field.

I will sustain the objection.

Q. (By Mr. Dunne): And, Doctor, in arriving at a conclusion, forming an opinion as to the physical condition of the man and whether he should be accepted, this is as a matter of medical practice, is the history which is given to you by the man a matter which you, as a doctor, takes into consideration in arriving at your conclusion?

Mr. T. Ryan: Object to that on the ground that that is incompetent, irrelevant and immaterial.

The Court: Of course, that is a general question, he hasn't asked it with reference to this case.

Mr. T. Ryan: No.

The Court: I see no objection, no basis for the objection, [250] and I will overrule the objection.

(Testimony of Walter William Cress.)

The Witness: Question? I didn't get the question.

The Court: All doctors take into account in making a diagnosis the history of the case.

The Witness: Yes, sir.

The Court: We all know that.

Q. (By Dr. Dunne): And, Doctor, as a medical man, when a history is given to you and it is given to you untruthfully can you be misled as well as anybody else?

Mr. T. Ryan: Object to that, that is leading and suggestive.

The Court: Yes.

Mr. T. Ryan: Calls for the conclusion of the witness.

Mr. Dunne: I have no further questions.

The Court: Sustained.

Mr. T. Ryan: I have no further questions.

The Court: That is all.

(Witness excused.)

Mr. Dunne: Now, it is almost time for recess. I would suggest that your Honor excuse the Jury, I will complete the record by making an offer of proof, and then I shall rest.

The Court: I will give the jury a brief recess at this time, because we have some matters to take up. The jury may take a ten minute recess. Please bear in mind the admonition of the Court. [251]

(Jurors retire from the Courtroom.)

Mr. Dunne: Now, if your Honor please, to complete the record, and in respect to those first questions that were asked, which your Honor sustained the objections to, of course, my position is, in asking those questions, to complete the proof, my proving the ultimate fact that there are certain standards of physical condition that a man, such as described in the hypothetical question, would not meet those standards, if known, and applied by the doctor, and that in fact the defendant was misled by these misrepresentations, because had the doctor been told, then under the standard as set forth and under the practice of the doctor, such a man would not have been accepted as a fireman, for the purpose of showing reliance and being misled by the misrepresentations.

Also suggest to your Honor that I have one instruction for you, and I have it here. And I have nothing more to offer, if your Honor please, and the defendant rests at this time.

The Court: Both sides completed their evidence, then?

Mr. T. Ryan: Yes, your Honor.

The Court: The Rules provide that the Court will advise counsel before the argument——

Mr. Dunne: May I, before your Honor does that, I appreciate that this must be done, and having offered evidence under the Rules I probably could waive my earlier motion to dismiss. As I did not, I now renew it at the conclusion of all the [252] evidence so that at this time I move for a directed verdict, this first count having been dismissed, that

is aside now, I move for a directed verdict as to the second count on all the grounds stated yesterday in my motion to dismiss with respect to that second count and may it be stipulated that I need not repeat all of it?

Mr. T. Ryan: Yes, I will so stipulate.

The Court: The Court will deny the motion on the same grounds on which I based the denial of the motion at the conclusion of the plaintiff's case.

The form of instructions that have been proposed by both sides, that is, in the aggregate by both sides, in view of the purpose of the rule, which is to advise counsel concerning the Court's instructions to better enable them to make their arguments to the jury, the Court will merely state at this time that in the precise form submitted all of the instructions are rejected.

The Court, however, will give in substance many of the proposed instructions by both sides.

It will give the usual instruction as to the province of the Court and Jury, the weight to be given to the testimony of witnesses, the standards that apply in that regard, the rule as to the burden of proof. It will give the jury then in substance the provisions of the Federal Employers Liability Act and will advise the jury of the degree of proof required by [253] the plaintiff. It will advise the jury that the doctrine of assumption of risk will not apply, that contributory negligence, if there is contributory negligence, is only a pro tanto division, that is, if the jury believes that there has been con-

contributory negligence under the definition to be given, that the doctrine of comparative negligence applies and the amount of any award if they find there has been negligence, is reduced in proportion in the amount of contributory negligence, if any.

The Court will advise the jury as to the requirement that proof as to interstate commerce, what degree of proof is required, and leave it to the jury to say as to whether or not there was interstate commerce here. It will advise the jury as to the—that it is necessary to have, regardless of employer and employee, in order to sustain a cause of action under the Federal Employers Liability Act, and that one of the questions of fact for the jury to determine is whether or not, according to the statutes which the Court will give the jury, there was a relationship of employer and employee at this time, what those standards will be. Then in substance the standards that are used by Judge Hughes in the Watkins case, the degree of control by the railroad company over the activities of the plaintiff and whether or not those activities were for the benefit of the railroad company.

The Court will leave to the jury the question as to whether or not there was or was not any fraudulent representation [254] in the obtaining of employment, and if there was, whether or not it was of such a nature as to substantiate the right of the plaintiff to secure this status of student fireman.

The Court will give a resume to the jury very briefly of the respective contentions of the parties and the issue involved.

As to damages it will give the usual instructions as to the measure of damages applicable here, if the jury should conclude that the plaintiff is entitled to a verdict.

Tell the Jury that it may take into account the usual factors as to the nature of the injury, whether or not it is permanent, and the elements that go into fixing damages, such as pain and suffering, and loss of earnings in the future, advise the jury that they may take into account the life expectancy of the plaintiff, and that so far as loss of earnings is concerned the total must be limited to the present value of the loss of future earnings based upon earnings in the past and upon their investment at the reasonable rate of interest, which the Court will suggest is approximately three per cent, that the jury cannot take into account any earnings that might be speculative as to the future, but only the loss of earnings based upon the earning capacity of the plaintiff in the past.

I will also tell the jury that they may not take into account any injury that the plaintiff may have already had, [255] would not be fair to charge the railroad company with any injury which the plaintiff suffered and still had as a result of his service for the United States in the Navy or in the Merchant Marine or by virtue of any prior accident that he may have had, that those are matters that any disability as a result of those injuries is not compensable in this proceeding in the event of a verdict for the plaintiff.

I think that what I have said in general is suffi-

cient to advise counsel as to the general nature of the instructions. Objections to the instructions may be made at the conclusion of the instructions.

Mr. T. Ryan: Your Honor going to instruct that they may take into consideration the reduced purchasing power of the dollar?

The Court: I notice that you cited the Guthrie case there, but I don't think that I gave that instruction in the Guthrie case, did I?

Mr. T. Ryan: I don't recall, all the way through——

The Court: Some time ago in previous cases I have given such an instruction, and the California Supreme Court seems to have considered it valid, but in later cases I concluded that where an award was based upon, in part upon earnings, earning capacity, that it would be improper to give that instruction because then the judge would be inferring that whatever award the jury might give based upon prior earning capacity it should [256] be increased by some amount out of relationship to the value of the dollar. That, I think, would be improper, irrespective of whether other Courts have held that way or not. That is not a proper instruction when any part of an award is based upon earnings.

Mr. T. Ryan: That wouldn't preclude us from arguing that to the jury, though, that is, on pain and suffering they are going to give, give damages for that, I have a right to comment that the dollar today isn't worth nearly as much as in the thirties and the verdict should be higher for that reason.

The Court: I don't think any jury should be

instructed as to base their verdict upon any verdict that has been given in the past in any case. They are to assume that the award is the present value of the loss of future earnings, plus any damages that might be ascertainable due to pain and suffering.

Mr. T. Ryan: Yes.

The Court: And the general nature of the injury. I will not, Mr. Ryan, give any instruction to the jury which tells the jury in effect that they can give more than some jury gave in some prior case at a certain point of time, because I think that is especially bad law. While I have the utmost respect for courts which have given that instruction, I could never see it had any validity because it is an invitation to disregard the evidence in the case.

Mr. T. Ryan: Your Honor may not conclude that as a matter [257] of law, but as a matter of fact and what the jury can do from their experience in human life and the world we are living in, not living in a vacuum, I believe I, as an attorney, at least have——

The Court: I don't think it is necessary for any attorney to argue that because the tenor of verdicts today is certainly in keeping with the standards of today and my experience has been, and I can only speak from experience, that juries today render their verdicts in accordance with the standards that pertain today and not the standards that pertain to prior years. And I have never seen any complaint in that regard. I think these other decisions in that regard are the decisions, and I say it most politely,

are the decisions of theorists and you have to see, to sit in actual contact in the trial courts with the functioning of juries to see how they function, and if I thought it was in the interest of justice to call attention of the jury to the fact I would certainly do so. But I don't think the juries today need any admonition in that regard.

I say that to you very frankly and I don't think it is a fair comment to make to the jury because the jury renders its verdict in the atmosphere and against the background of the evidence of the particular case and in the light of their own knowledge of the status of the world, economically and otherwise today, and I don't think that there is any need in the interest of justice to make such a statement to the jury and I [258] think it might also lead to error, might cause a judge to feel, after the verdict came in, that the verdict is the result not of the evidence in the case but of some theory that would indicate that the jury is going beyond the bounds of the evidence in the case and which might be just grounds for asking the court to interpose with respect to the verdict after it is rendered.

Perhaps I have taken a lot of time on this, but I feel that this is not a proper comment.

Mr. T. Ryan: Very well.

The Court: However, I would like to see this case go to the jury and I don't intend to suggest, counsel, that you should limit yourself, but I think it should go to the jury in the early afternoon; how much time do you think you require for argument?

Mr. T. Ryan: My brother, who is going to make

the opening argument, says he will be about a half hour.

The Court: How much time do you think you would like to have to take, Mr. Dunne? Whatever time is to be taken should be fairly the same.

Mr. Dunne: Very, very seldom do I argue one of these cases over an hour, but I do know that sometimes you get started and you take more time than you think. My guess would be that I would take about forty minutes.

The Court: Well, suppose that both sides try to get through in less than an hour, if you can, and I will ask the jury [259] to come back at 1:30.

Mr. T. Ryan: Fine.

The Court: Submit it to them a little bit earlier, give them enough time to complete the matter.

Take a recess.

(Short recess.)

(Whereupon counsel for plaintiff and defendant presented argument to the jury after which the Court instructed the jury as follows:)

The Court: Members of the jury, since this is the first experience of most of you in serving as jurors I should like to take just a moment to tell you somewhat generally about your duties as jurors.

Traditionally our juries are given the power and function of deciding the questions of fact in every case, be it criminal or civil, and in this particular case it is your job to decide the question of fact. Here you will have to decide whether or not the

defendant railroad company is liable to the plaintiff and if it is, the amount of the damages. That, in general, is your function—that is the question of fact you will have to decide. The judge doesn't take any part in that. That is exclusively your function.

The judge, on the other hand, has the duty of telling you what the law is so that you may be helped in arriving at the just result, and you have to assume, rightly or wrongly, [260] that the judge knows what he is talking about when he tells you what the law is.

You should not come into the jury box in this case or in any case with any preconceived notion on social or economic questions. You don't divide money up between people because you have some pet theory that you had in mind. You come here and you listen to the evidence and you decide the case on the basis of that evidence, applying the principles of the law which the judge gives you.

You are not to indulge in any sympathy or in any prejudice in arriving at your decision. And so it is that while the judge and the jury have a little different function to perform, we are, in a manner of speaking, a sort of a team because it is our common objective to accomplish justice. While you are here you are an arm of the court just as I am as a judge, and our sole purpose is to endeavor to further the interests of justice and to make our courts stand for something in our system of government and society.

Now, I have said to you that you shouldn't indulge in any sympathy or prejudice. You shouldn't be

prejudiced against the railroad company because it is a railroad company, or a corporation. I called that to your attention when you were impanelled. In like manner you are not to render a verdict for the plaintiff because of the natural sympathy you may have for him. This young man performed very valiant service for our [261] country in a very extraordinary military maneuver in Guadalcanal. For that he, as well as thousands and perhaps hundreds of thousands of others, who have served, should have our respect and our thanks. However, much as that is a natural call upon our sympathy, it is not the basis for any award in a civil action between private citizens because the defendant in this case cannot be held to be responsible in any way for the injuries which he suffered in the service of his country. And it cannot be held responsible individually any more than Mrs. Erb or myself could be held responsible individually in dollars and cents for the damage which the young man had in the war.

I emphasize that somewhat because I feel myself in actual sympathy for this young man who served his country, and I would have to school myself most carefully if I were acting as the trier of fact instead of yourselves as jurors to be sure that I was meting out exact justice in performing my duty by abiding by my oath just as you do abide by your oaths as jurors.

Now, there are some general rules of law that apply in all civil cases. I will just give you a few of them, we don't need to burden you with too many of them.

You have the right to determine the weight you wish to attach to the testimony of the witnesses who have testified. There isn't very much for you to resolve here so far as the weight of testimony is concerned. There has been no substantial matter upon which there is a conflict of testimony except in one [262] phase of the matter to which I will refer in a moment. But generally speaking yours is the power to determine how much weight you are to give to the testimony of witnesses. If you think a witness has testified falsely in any material respect you are justified in rejecting all the witness' testimony.

In this kind of a case, a civil case, the law imposes upon the plaintiff the burden of proof. That means that he must prove his case by a preponderance of the evidence.

That, in turn, means that the testimony offered on behalf of the plaintiff must have more convincing weight and effect than that which appears to be in favor of the other side, of the defendant in the case. And if the evidence viewed in that way appears to be equally balanced between the two parties then the conclusion is proper that the plaintiff has failed to sustain the burden of proving the case by a preponderance of the evidence.

You have to disregard any testimony that has been stricken by the Court or any testimony of a witness when an objection has been sustained to the question which elicits the answer.

The attorneys have argued this case to you. They

have that right and it is, in fact, their duty to do so. But if you should find any discrepancy in the testimony, as you recall it as having been given by the witnesses, and the testimony as it is stated to have been the testimony by the attorneys in their argument, you should disregard the attorney's statement in that [263] regard and place reliance only upon the testimony that you heard produced here in the courtroom.

Can you hear me?

A Juror: Any objection to using the mike? I couldn't hear very well on account of the noise.

The Court: Have you been able to hear me?

A Juror: I can hear all right, but the noise on the street——

The Court: We have got this to contend with on account of their building some additional Courtrooms and the hammers always go at the wrong time.

In this particular case, members of the Jury, the facts are not particularly in dispute. The suit is brought under the Federal Employers Liability Act I mentioned to you when you were impanelled and that that was a Federal Statute that applied to railroad companies when they were engaged in interstate commerce. In effect it extends to employees of railroad companies the right to maintain an action against the railroad company if it appears that an employee has been injured as a result in whole or in part of the negligence of any of the officers or any employee of the carrier, that is, the

railroad company, or by reason of any defect or insufficiency due to negligence in its cars, engines, appliances, machinery, tracks, and so forth.

Now, in this case it has been admitted by counsel, and it [264] is proper for the Court to make a comment to you, that the leaving of the door of the engine box open was an act of negligence. And if an employee of the railroad company, while the railroad and the employee were engaged in interstate commerce, was injured as a result of that, as the proximate result of that negligence, then there would be liability upon the part of the railroad company.

The railroad employee under this statute does not assume the risk of any injury that may come to him as a result of negligence.

It may be, and it sometimes happens, that in some cases there is what is called contributory negligence on the part of the employee. That is some act or omission on the part of the employee which go along with and contribute with the negligence of the railroad company concurring in the damage. That, however, is not a bar to a recovery in a suit under the Statute. And if it should appear to you in this case that the plaintiff was negligent, as well as the railroad company, then you would have to determine how much of the total negligence was attributable to the railroad company and how much was attributable to the plaintiff. And the plaintiff would in such case only be entitled to recover that proportion of the total negligence which the negligence of

the railroad company bears to the total negligence.

I can illustrate that to you in this way: Let us assume [265] for the sake of argument that in this case, while I am not indicating that that is the fact at all, that 50 per cent of the negligence was the negligence of the railroad company and 50 per cent was the negligence of the employee. I take the figures 50 per cent for illustrative purposes because they are about as near neutral as I can find two figures. In that event if you found that the railroad company was liable and that it was negligent, in that event you would determine the total amount of damages and then you would only award fifty per cent of that amount to the plaintiff because that is the theory of comparative negligence that is applied in cases where contributory negligence is established under this law.

Now, that is the general situation that applies in a case of a suit brought under the Federal Employers Liability Act.

In this case it is necessary for you to determine two other matters before you may make a finding of liability upon the part of the railroad company. The first of these is that it must be established that the plaintiff was an employee within the meaning of the Federal Employers Liability Statute at the time of this accident. This Federal law, Federal Employers Liability Act, does not itself define what the word "employee" or "employer" means as used in the Act and the Courts have from time to time given definitions. The principal one that has been

given is that it is the traditional relationship of employer and employee that is meant. This plaintiff was a [266] student fireman. The evidence showed he was learning, going to learn to be a fireman and he was given permission to perform certain duties and to engage in certain activities by the railroad company as a prelude to his possible employment by the railroad company.

Now, the test that has been used and has been referred to by the attorneys in this case in determining whether or not he was under these circumstances an employee is this: That the relationship is dependent principally upon whether or not the employer, in this case the defendant railroad company, retained and had the right to direct the manner in which the work was to be done by him, and also whether or not the service or activity which he was engaged in was a service for or an activity for and on behalf of the railroad company.

Now, you look at the facts that you have heard in this case concerning the circumstances and nature of the relationship between the plaintiff and the defendant and on the basis of that definition which I have just given you, you determine whether or not the facts show that the plaintiff was an employee of the railroad company. If he was, then he is entitled to the benefit of this Act, and if he wasn't, then of course you should decide the case in favor of the defendant.

One other matter you will have to determine, too, before you can determine whether or not the

plaintiff is entitled to the benefits of this Federal Statute is whether or not the [267] plaintiff and the defendant were at the time engaged in interstate commerce, and it isn't necessary for the evidence to show that any precise activity of the plaintiff at the particular time of the accident was a part of interstate commerce. It is only necessary that it appear from the evidence that any part of the duties of the employee shall be in furtherance of interstate commerce or foreign commerce, or which in any way directly or closely and substantially affect such commerce.

Therefore, look at the evidence in this case that you have and decide whether or not under that evidence the activity of the plaintiff at the time of this accident was of the nature of activities that I have just described to you as coming within the provisions of this law. If you find that they were, then the plaintiff has established that he was engaged in interstate commerce. If they were not, he has not so established that fact and of course if that is not established then you could not render a verdict in favor of the plaintiff.

There is another matter that you will have to determine in this case that affects the right of the plaintiff to recover and that is the defense that was urged by defense counsel, namely, that this plaintiff misrepresented his physical condition and falsely stated it and the defense is that by virtue of that fact he is debarred from claiming the benefits of this statute.

Now, you should examine the evidence in that

regard and [268] you should determine first whether or not the statements alleged to have been made by the plaintiff at the time he was examined were or were not false. If you determine that they were not false, then there is no need to pursue your inquiry any further, that defense will have failed. If, on the other hand, you determine that those statements made were false, then the next thing is to determine whether or not that caused any damage or change of position so far as the defendant was concerned, whether or not the defendant lost thereby the right to exercise the judgment as to whether or not the plaintiff should be employed or not. And you also have to further consider whether or not, even if that were so, whether or not there is any casual connection between the nature of the false statement, if it be a false statement, and the accident itself. If there be no casual relationship between the two, then of course it cannot be said that the defendant suffered any particular harm because of the false representation.

Those are the factors, members of the jury, that you should consider in determining whether or not that defense has or has not been sustained.

Now, members of the Jury, I think I have talked to you a little long, but this case does present some questions that are sometimes not present in other cases, and hence it is that I am speaking longer than I usually do to a Jury instructing. And this being your first Jury case you probably won't get as [269] tired of me as you might had you been on other cases and heard many judges' instructions.

You may start with the assumption that the leaving of the door in this engine firebox open was negligence. You then have to determine whether or not the plaintiff himself was guilty of any contributory negligence.

My own personal opinion in that regard is that there isn't very much substance to any claim that the plaintiff was himself in any way contributorily negligent. However, that is merely my own opinion and you are not bound by it and you can come to your own conclusion on that.

And the next thing you have to determine is whether or not there was interstate commerce present, and then you have to determine whether or not the plaintiff was an employee, and then you have to determine whether or not there is any basis to the defense of a fraudulent representation as I colloquially described it.

Now, if you decide in favor of the defendant on any one of those matters, then of course you can render a verdict for the defendant. But if you come to the conclusion that there was interstate commerce and that the plaintiff was an employee and that the defense of fraudulent representation is not sustained, then you are justified in coming to the conclusion that the plaintiff is entitled to recover.

That will bring you then to the question, after you have [270] covered those points, as to what damages the plaintiff is entitled to recover.

Now, generally speaking, in an action of this

kind, the Jury should consider the nature and the extent and severity of the injuries suffered and whether the same are temporary or permanent in character, and you can consider the mental and physical pain suffered by the plaintiff and which you are satisfied the evidence shows are reasonably certain to be suffered in the future.

And you also have the right to consider the value of any earnings that may be lost as the result of the disability—that is the loss of earning power, I should say.

Now, you are not entitled to award the plaintiff the full amount of any sum that you may determine is his earning power in any life expectancy which he may have, of some forty years, but you may only give him the present value of the loss of any future earnings only to the extent that those earnings, lost earnings, would reasonably result from the injury which he has suffered.

You can take into account his condition prior to the accident and his condition at the present time and take all those factors into account. You may determine the amount of damages that he should receive that precisely resulted from the injuries sustained.

I will say to you again that what I said to you in the [271] beginning, that the plaintiff is not entitled to recover anything for the injuries which he had already at the time of this accident for which the defendant, of course, is in no way responsible. So the award must be limited to the actual damages

which result from the particular injury which he incurred here.

Those damages must be reasonable. You are not here to impose penalties upon this defendant in any way, shape or form. The damages are the scheme which our law has devised in compensating for injury. We know of no other way of compensating for injury, but it must be on a strictly dollars and cents basis and it must be reasonable and it must bear a relation only to the actual injury incurred. You should use your common sense if you come to the point of estimating damages and confine yourselves strictly to the evidence in the case.

Now, you are not to infer because of the fact that I have given you instructions on the subject of damages that I am indicating that your verdict should be in favor of the plaintiff. I give you the instructions with regard to damages only so that you may have a standard to guide you in the event that you determine that plaintiff is entitled to damages.

You are not entitled, in determining the matter of damages, to consider what possible earnings the plaintiff might make in the future. You can't speculate on that. You can't reach up in the sky, as it were, and say, "I think [272] this plaintiff earned \$1000 when he is thirty years of age, and therefore calculate the damages on that basis." The basis of calculation, the loss of earning power, must be on the basis of the earning capacity of the plaintiff at the time of the accident and injury

in question, and a time reasonably proximate thereto in the past.

Now, members of the Jury, I think I have given you much that will help you, something that will help you in the consideration of this case. If you can conscientiously do so you are expected to agree upon a verdict. You should freely consult with one another when you go out in the jury room. I should like to say to you that if anyone should be convinced that your view of the case is wrong, after consultation, you should not be stubborn, you should not hesitate to abandon your own view under such circumstances. On the other hand, if after a full exchange of ideas you still believe you are right, you should adhere to the viewpoint which you have expressed. Your verdict should be based upon that sort of a consideration of the case.

Now, I want to caution you about one other matter, that is, if you should find in favor of the plaintiff, should award damages, you shouldn't arrive at the damages by any plan or scheme of chance. Sometimes in the past some jurors arrived at damages by each juror writing on a piece of paper how much he thinks the plaintiff should get and add them up and [273] divide them by twelve and get a result that way. We refer to that as the pooling plan. You cannot do that, because we wouldn't need a jury to do that, we could pick up any twelve people and have them do that and that would be an easy way out, and to be frank about it that is a lazy man's or woman's way of

arriving at a decision. I don't mean that if you do consider the question of damages you shouldn't suggest some amount that you think is right and then by discussion between yourselves arrive at a result. All I am meaning to imply is you shouldn't do it by any scheme of chance.

Now, whenever all of you agree to a verdict it is the verdict of the jury. In other words, your verdict must be unanimous. You should not return to the Courtroom with a verdict unless in the jury room all of you agree upon the verdict.

When you go out you will select one of your members as a foreman or forelady. Since you are evenly divided between men and women there is a fifty-fifty chance of selecting either a man or a woman as foreman of the jury. That we leave entirely to you, at any rate, to select one of your number as a foreman or forelady, and he or she will represent you as your spokesman in the further conduct of this case and will preside over the deliberations in the jury room, and he or she will sign the verdict of the jury when you have reached a verdict.

Now, we have two forms of verdict prepared for you to assist you so that you won't have to write any form of verdict [274] in the jury room. One verdict reads: "We, the jury, find in favor of the plaintiff and assess damages against the defendant in the sum of blank dollars." If you come to a verdict in favor of the plaintiff you will fill in the amount of the verdict and the foreman will sign that form and that will constitute your verdict.

Then the other form of verdict reads: "We, the jury, find in favor of the defendant." If you come to a verdict in favor of the defendant your foreman will sign that form and return it and that will be your verdict.

These forms have been prepared for your convenience and not intended to indicate to you in any manner what your verdict should be, in the manner I have read them to you or in the order that I have read them to you.

Do either counsel wish to note any exceptions? Wish the Jury excused for a moment?

Members of the Jury, it may be that I may have to make some change or addition to the instructions which I have given you and for that reason I will ask you to take a brief recess. The case is not yet submitted to you, the instructions are not yet complete, and you are still under the admonition not to discuss the case among yourselves or to form or express any opinion. I will send for you in a few minutes and notify you whether or not I have anything to add to the instructions.

Will you take the Jury out, Mr. Jones? [275]

(Jury retires from the Courtroom.)

Mr. T. Ryan: Shall I proceed?

The Court: Mr. Ryan, you wish to note any suggestions or exceptions?

Mr. T. Ryan: Yes, Your Honor, I wish Your Honor would instruct the Jury that it is not necessary for the plaintiff to receive compensation before he can be considered an employee. We sug-

gested that in our proposed instruction No. 13, said, you are instructed even though the plaintiff was a student fireman at the time of the accident and although he was not earning compensation, nevertheless he was an employee of the company and comes within the Federal Employers Liability Act. The jury might think that we are required to show he received compensation before he could be considered an employee, and I am doing that in the light of the *Watkins v. Prior*, whatever the case is.

I make an exception also on what Your Honor has already ruled that Your Honor failed to instruct the Jury that they could take into consideration the reduced purchasing power of the dollar and also I ask Your Honor to instruct the Jury that three per cent is a reasonable amount to take into consideration in figuring the present value of future earnings.

So in regard to that first request I had, that is, Your Honor instruct the Jury that he may be an employee even though he didn't receive compensation, we ask that especially in view [276] of the fact that Your Honor told the Jury they have a right to take into consideration the traditional relationship of employer and employee and the traditional one is usually where an employer pays compensation and the employees receive wages, because——

The Court: I don't think I told them they should take into account the traditional—I may have said preliminarily that some Courts have said that, but

that the test they were to apply is the one I gave them.

Mr. T. Ryan: I understand, Your Honor, when some courts have considered the traditional relationship Your Honor might have caused them to believe that if plaintiff didn't show a traditional relationship then he was not an employee, and the traditional relationship concerns the salary or a wage.

That is all of ours.

Mr. Dunne: Your Honor, please, we respectfully except to the refusal of defense proposed instructions Nos. 22 and 23. No. 22 is the Harmon case, told the Jury even if this young man was in a status of employee, if, on a particular occasion when he was injured he had departed from the course of his instructions in his own interest and benefit and deviated from the line of activity designated on the shift and went on the locomotive, then he had departed from the course and scope of any employment and could not recover.

And in connection with the same thing, Instruction No. 23, [277] hostler Petersen had no authority to set aside or modify any earlier directions or instructions which the plaintiff may have received by requesting him to go upon the locomotive and that a request from Petersen or an invitation from Petersen did not obviate or set aside earlier or contrary instructions.

The Court: Are those the only two?

Mr. Dunne: Only those.

The Court: I purposefully did not give those instructions and you may have it for the record so that you may have it for your protection as well, because I did not feel the facts of this particular case justified the giving of that instruction, not because I had any particular quarrel with that as a statement.

Mr. Dunne: Yes, Your Honor.

The Court: Now, with respect to the other matter, Mr. Ryan, inasmuch as I specified with particularity the test of the employee relationship I don't think it would be necessary for me to say the things that they were not to consider, because I think the instruction I gave was broader than that and I think if I were now to point out some particular thing it might be almost equivalent to telling them he was not an employee.

Mr. Dunne: There was no dispute in this case that he was not receiving compensation, and so obviously they must be able to decide it. [278]

The Court: I don't know how to cover that on that three per cent matter. It is true I didn't mention that. I don't think it is of any particular significance, because you have argued it to them and the Court and no one has taken an exception to that and I told them that they should figure the present value. I see no reason again for singling that out at this point. I think it would give undue emphasis.

Mr. Dunne: May I have an exception noted for the record?

The Court: Any exceptions will be noted.

Mr. T. Ryan: Exceptions will be noted, very well.

The Court: Bring the Jury back, Mr. Jones. Just line them up in here, don't have to put them in the box. Perhaps I should have used that loud-speaker.

Mr. T. Ryan: That is what a Juror asked.

The Court: The wires are mixed up, makes it difficult to use.

(Whereupon the Jurors were called back into the Courtroom.)

The Court: Members of the Jury, I will ask you not to take the box because it isn't necessary. The instructions of the Court are complete and you may now go outside and deliberate and reach your verdict in this case.

(Whereupon the Jury retired at 3:07 p.m.)

The Court: I will say, counsel, I shall file the proposed instructions that you have presented in the case so that your exceptions taken to them, by number, will be intelligible in [279] the record, so won't have any difficulty about that. Take a recess.

(Whereupon the Jury returns to the Courtroom at 6:07 p.m. and the following proceedings were had:)

The Court: Have you, members of the Jury, reached a verdict?

The Foreman: Yes, Your Honor.

The Court: Will you hand the verdict to the Deputy Marshal, please?

Will you read the verdict to the Jury, Mr. Clerk.

The Clerk: Ladies and gentlemen of the Jury, hearken to your verdict as it will stand recorded. "We, the Jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of \$50,000." So say you all?

(Whereupon there was an answer in the affirmative.)

The Court: Do you wish the Jury polled?

Mr. Dunne: Yes.

The Court: Will you poll the Jury?

(Whereupon each and every Juror was polled and the answer was in the affirmative.)

The Court: Twelve jurors having answered in the affirmative, the Clerk may record the verdict.

Members of the Jury, the Court wishes to thank you for the attention which you have given this case and for your attendance at the sessions of this Court as required. I don't [280] know when you will next be called upon to serve upon the Jury, but whenever that time comes you will get the bad news from the U. S. Marshal.

The Jurors may be excused.

(Jurors excused.)

The Court: The record should show that while the Jury was deliberating the Court received the following inquiry from the Jury, and I quote:

"Are we to take into consideration the fact

that false statements were made on the application for employment in determining settlement?"

To this inquiry, with the consent of counsel for both sides, the Court replied as follows:

"The defense interposed by the defendant based upon alleged false statements made in the application for employment goes to the question of the liability of the defendant. It has no relationship to the matter of damages in the event the Jury should decide for the plaintiff."

And you may file the written advice in the files of the case.

The Clerk: Yes, sir.

Mr. Dunne: May we have the usual stay of execution until ten days after determination of motion for a new trial?

Mr. T. Ryan: No objection.

The Court: Very well, that will be the order.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 281 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ P. D. NORTON. [281]

Friday, July 27th, 1951

The Clerk: Libbey vs. the Southern Pacific Company, motion for new trial.

Mr. Dunne: If your Honor please, may the record show that the defendant moves in accordance with its moving papers on file in this case, the motion being one for a new trial, and I want to call to your Honor's attention, for the purposes of the record largely and to make suggestions, to two matters which your Honor has passed upon and one matter which your Honor has not passed upon, and that is the amount of the verdict. I will not have to state the facts of this case. I am sure your Honor has them fully in mind. In re-reviewing the record and reconsidering it in the light of your Honor's submitting the matter of employment to the jury, there is a question there, the question on the basis of the employment alone without regard to any fraud under the doctrine of the Rock case, the question of fraud under the doctrine of the Rock case, and then the question which your Honor did not submit to the jury, as to whether or not, assuming this man had been employed within the meaning of the Federal Employers Liability Act, he departed from that employment.

I would like to take those in inverse order, if I may. Assuming that this man had acquired the status of an employee, I think the record is very, very simple on it. He stated that [2*] he was told to follow the fire lighters and to keep his eyes open

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

and learn what he could about being a fireman. That was his testimony.

The second item of his testimony was that on two shifts he did follow the fire lighters, and he did state that he himself lit two fires. Then along toward the end of the shift, on which he was hurt, the second shift, around ten o'clock the fire lighters told him, well, the fires were all lit, there was nothing more for them to do. Just about that time Peterson, the hostler, came along. Peterson then said that he was going over and he was going to move the locomotive on which the accident happened. Peterson did not say that he invited the plaintiff to come along with him. The plaintiff said that he did. But Peterson said that in view of the fact that he had told the plaintiff, whom he had known before, that he was about to move the locomotive, he expected him to come along. Peterson's attitude was if he didn't say it in so many words there was a tacit invitation for him to come along and get on the locomotive, and, of course, Peterson knew that he was on the locomotive at the time Peterson undertook to move it.

The third item of testimony in that regard, and it is the only testimony on the subject, is Peterson's own testimony as to what functions he had with respect to a student fireman who at the moment from his superiors in the roundhouse had received no instructions except to go along with the fire lighters and [3] keep his eyes open and learn what he could about being a fireman. Peterson's testimony was this:

“Q. I see. Now, incidentally, had you had experience before with student firemen there at the roundhouse?

“A. I have had experience with student firemen. I have had them on the road—with them on several engine trips, road trips. As far as in the roundhouse, why, they are not under my jurisdiction.”

So Peterson's testimony in that regard is entirely consistent with the plaintiff's own testimony that his instructions were to follow the fire lighters.

It is apparent that the people who move locomotives around roundhouses are hostlers. Peterson was a hostler. Peterson was about to move a locomotive.

This testimony was offered by the plaintiff and not by the defendant. So there is a clear statement there by the hostler Peterson consistent with the plaintiff's original instructions that he as a hostler had nothing to do with student firemen, and it follows from that if the student fireman was going along with him, the student fireman at that moment on his second shift was stepping aside from the course prescribed, prescribed course of activity, whether it be called duty or otherwise, of a student fireman.

The Court: Your point then is not that he did not have the so-called status of student fireman but at the precise [4] moment, time, of this accident he was not engaged in activities that represented his position.

Mr. Dunne: As far as this point is concerned, that is exactly the point I am making, your Honor. I am assuming for the purposes of this point that he had the status of employee and indicating to your Honor that he stepped aside, he went off on a frolic of his own, which is the classic expression, at least in the older cases, but what he was doing he was doing something for himself, and stepping aside, in doing it, any relationship which he had assumed with the defendant.

In connection with that I want to again call your Honor's attention for your Honor's consideration, although you gave it consideration once, the defendant's rule in its book of rules. If this man had the status of an employee and whether he knew of those rules or not, those rules certainly defined his status. They certainly defined his relationship as to the defendant. It was perfectly clear. No dispute on this. It was perfectly clear that in going with Peterson he was going along to be on the locomotive at the time the locomotive moved. Rule 864 reads:

“Persons must not be permitted to ride on an engine or in a baggage, mail or express car without written order from the proper authority.”

Of course, none of that would apply at the moment. No question [5] of proper authority. But then there is an exception. The question is the application of this exception:

“Except employees in the discharge of their duties and those holding transportation endorsed to that effect.”

I am perfectly frank to say to your Honor that while we made a search for it I have found no case precisely in point. There are cases of unauthorized persons on locomotives being treated as trespassers. There are, of course, the usual cases of people stepping aside from the course of their employment. But to give your Honor a case in a situation such as this, I can't do it, and I am not going to attempt to do it, because your Honor is familiar with the general principles that apply, as I am. The only other case that could possibly have some bearing and that does, I think, have some bearing in this regard is that case of Harmons Administrator. It was cited in our instruction on this proposition, and I will give it to your Honor again. C. & O. Railroad Company against Harmons Administrator, 173 Ky. 1, 189 S.W. 1135.

I can state that case to your Honor very shortly. It presents the principle but is radically different on the facts concededly. In that case the man was a student fireman and had gone on a train. He had been in the locomotive of the train under the supervision of the engineer and the fireman and he had actually, as I recall the case, performed some of [6] the fireman's duties. It was a coal-burning engine, and I assumed that he shoveled coal. After the run had progressed to a certain point, they got to a stopping point, as I recall the facts of the case, but there was a very distinct break in what he was doing on the locomotive. I think he went home to get some clothes or some food or something else. Then he got back on the train, as the train was to

continue on, but at this time he got on the caboose. While he was in the caboose the conductor on more than one occasion told him that he had no business being in the caboose, that he ought to get up in the engine, and also on more than one occasion the engineer, through the conductor, sent word back to him to come up to the locomotive, that he was wanted, that he wanted him to act on the locomotive as a student fireman, and, I think, at one time the message was that the fireman himself was tired. The deceased persisted, however, in staying in the caboose, and was in the caboose at the time of a rear-end collision and was killed. The facts are obviously, if your Honor please, radically different, but the Court does make a point, although he was on the train at the time and without saying that he was there as a trespasser it does say at that time he had stepped aside and the status of employee did not apply to him.

Further search after this case was tried, and that matter has failed to disclose, for us at any rate, cases which on their facts are close enough to be helpful. The matter then is [7] a matter of the application of what I think is perfectly well established principle and thus applies to the facts of this case and to the very simple facts in the light of this rule, and if not, then if it were a question of fact for the jury at all, whether assuming the status of an employee he had stepped aside from that and could no longer be said to be performing service, whether or not it was there on your Honor's part to exclude Rule 864.

Your Honor's two rulings in that regard, first, that you did not think 864 applied and declined to receive it in evidence, and, on the second thing, your Honor did not think there was any question of fact there and refused our two instructions, to submit that matter to the jury as a question of fact, and it was the exception to the refusal of those two instructions, which was the only exception which I took to your Honor's charge.

Now going back to the proceeding step, the matter of employment. On the matter of fraud, we had the doctor on the stand who examined this young man. He did not remember him. He had, however, made out this application, which is here in evidence, and the application on its face indicated in connection with the questions that were put, that this young man had made misrepresentations, and that when the doctor saw the scars of his prior injury on the left leg they were explained away on the ground that that was an injury that he had as a [8] child and, while he didn't testify to that, if true, would leave the inference that the injury was not disabling and the man had been in the Marines, in the service since. I then asked the Doctor this question, putting to him the hypothetical situation of this young man and an objection was made upon the ground that I had not included all the elements, and I then included all the suggested elements and in effect put this question to the Doctor:

"Doctor, had you known these facts at the time you passed this man, would you have passed him as a fireman?"

To which your Honor sustained an objection upon the ground, as I recall it, that perhaps it invaded the province of the jury and called for the opinion and conclusion. Perhaps it was somewhat hypothetical because it was now asking the Doctor what he would have done in the past knowing now this event he didn't know about then. As to that type of question, if your Honor please, very frankly, without bringing to your Honor all of the authorities on it, there is some division among the courts as to whether or not such a question should be answered. I suggest to your Honor that it is a question which ought to be put and on which we should be permitted to have the answer, and that the method of testing it is by assuming that the answer would have been unfavorable to me. Assuming that had I put the question to the doctor, his answer [9] would have been, "Had I known all the facts, I would have accepted him anyway," it is perfectly obvious that such an answer would have completely destroyed any claim upon our part there was any fraud upon which he relied and acted in connection with the employment. That being so I think the converse is equally true, that we are entitled to have the other answer. But that matter did not stop there and on this, so far as I know, there is no substantial dispute among the cases, although I cannot find a case on this precise point, or, at least, haven't found it yet.

The second question in effect was an entirely different question. I asked the Doctor again, I said:

"Doctor, assuming the same facts, would this

man have met the standards set by Southern Pacific Company for the employment of fireman?"

And again an objection was made and was sustained by your Honor. I think that is an entirely different question because that is not asking a doctor to speculate and to hypothetically transpose himself backward and say what he personally would have done as of a given time in the past in circumstances that he didn't know, but it is now asking him for his present opinion as a man qualified to give that opinion whether or not a particular man lived up to certain standards. It is obviously, if your Honor please, the only method by which, when the matter is submitted to personal judgment of a [10] physician and of one who is qualified to state an opinion and who is employed actually to perform those opinions, I suggest to your Honor that that question was an entirely proper question and it was very material going to the question of reliance. It well may be that the jury couldn't speculate one way or the other, but it is a question that goes directly to the matter of our reliance.

The third thing is in connection with the question of employee status, whether or not there was such a status in view of the relationship of the party. That is a matter which your Honor submitted to the jury. I have no new suggestion to make on that matter except to recall it to your Honor's attention. I have no new cases that I think will add anything in particular to the case of Watkins

against Thompson which your Honor read during the course of the trial. I could go through cases which are cited there. I could go through the other cases under the Federal Employers Liability Act, and then there are some older cases and cases in different situations. But so far as those cases are concerned, I think the Watkins case pretty well sums them up.

What the Watkins case does show is this—I think this is fair to say—the Watkins case permits us to look at all of the circumstances involving the relationship of the parties and all of the circumstances that throw light on it, and it says that the two principles—I don't think the Court in the [11] Watkins case wanted to be understood to say that these were the only two tests that were to be applied woodenly, but first whether or not the alleged employer had control over the conduct of the alleged employee. I would not suggest to your Honor in this case that he did not have such control so long as he was on our premises and was going about the activity, being student fireman, which is perfectly obvious, because we couldn't have a man like that wandering around the roundhouse, moving trains and locomotives and other equipment without having supervision and direction over him. So in that sense certainly we had control. In another sense perhaps we did not.

The other test, of course, is the main item, was whether or not this man was performing service. On that I think I have perhaps very largely covered the material. Your Honor made a suggestion

that perhaps in taking some of these positions I was being somewhat technical, and I have to grant that they are technical, somewhat technical matters because they are matters of the application of the statute, and yet whether we——

The Court: I don't think I was referring to the question of employee status there. I thought that was more particularly with reference to so-called defense of——

Mr. Dunne: Of stepping aside?

The Court: No, no. I thought—maybe I am wrong, but [12] my recollection is that I was referring only to the so-called fraud defense.

Mr. Dunne: Well, I don't mean to do anything more than to point out and use that as an introduction, which perhaps I should not use——

The Court: I don't think there is anything technical about the question of whether or not there was an employee relationship. That is a fundamental question.

Mr. Dunne: That's right, and because it has such marked results in the effects if the Act does apply.

Now, as bearing on that then, and this bears on a matter which I think bears both on the question of service and on the question of control. I would like to give your Honor again the language of our Exhibit A for identification, which was the writing that this young man signed at the time—I will find it someplace. Perhaps it was not read into the transcript. This writing which he signed and signed at the time he was going through these

various steps which brought him up to whatever status he had when he went into the roundhouse, that application for permission to observe operations of locomotives, cars and trains—to observe, not to perform service. Then:

“Whereas, I, the undesigned, Roger N. Libbey, residing at Sutros Heights in the State of California, and being 27 years of age, have applied to Southern Pacific Company for permission to enter and ride upon [13] the locomotives, trains, and cars of said company for the purpose of observing the operation of the railroad of said company, with the understanding that I shall be under no obligation to perform any work or service upon said railroad employed by said company, and that neither said company nor I shall be under any obligation with respect to my entering the employ of said company at any time.”

And then it goes on, he assumes the risk of injury.

I offered that as a whole, and then, because might be some possible implication arising from the second two paragraphs in which he said he undertook to assume the risk of injury, I offered that first paragraph alone and as a factual matter going to the question of what the question was and indicating he was there only because he had permission to observe and, secondly, on this matter of control, that he would be under no obligation to perform any work or service upon the railroad.

On the question of control, the question of con-

trol is a very curious one in some respects. Obviously——

The Court: Would you mind my interrupting there? Realistically speaking there can't be any question that this young man was known as a fireman.

Mr. Dunne: That's right.

The Court: How can you convert what he actually did by some writing that he signed into the contrary? I mean, if the [14] function or if in order to learn as a student fireman he must observe, then those observations that he makes constitute his service in the sense that he has to be there and physically and put himself at the disposal of the other employees so that he may be in a position to observe, and by observing acquires some learning as to the way these things can be done. And can you simply say by putting some words into the contract that that does not constitute service? It is merely an observation. And that while he is a student fireman he agrees in writing that he is not a student fireman? Doesn't that argument fall in the face of the many cases along that general line, that you cannot contract away by putting words in a contract the actual relationship?

Mr. Dunne: I would agree with your Honor thoroughly on that. I would agree with your Honor that the test is not by some form that we get up and have these people sign, but the test—the test of the real fact—and window dressing in the form of an agreement or whatever it is cannot be used to disguise that real fact, which your Honor will

look through—any such window dressing—to see what the real fact is. That I will agree with. But, and I think this is probably where your Honor and I part company, I offer that to show what the real fact is. Now, a moment ago I conceded, your Honor, that realistically this young man could be looked upon as a student fireman. Quite true. But that still leaves open [15] the question and does not solve the question whether or not a student fireman is an employee within the meaning of the Federal Employers Liability Act. And for that, even under the Watkins case, if we just take those two tests alone, two things must be true. We must have control and he must perform service for us. It is quite true that under our system where we don't have any indenture servants, there is no peonage, there is no slavery, that no matter what contract of employment a man makes he can leave that contract of employment at any time. But if there is a real agreement of employment he subjects himself to liabilities and he assumes responsibility when he is an employee, both to his employer and to some third person. Under this writing that I have just read to your Honor where he expressly said that he assumes no obligation to perform any service, that young man could have walked out of the roundhouse at any second of time he wanted. At the time the fire lighters told him there were no more fires to light, whether the shift was up or not, he could walk right out of that roundhouse and go right about his business being under no obligation to anybody at all.

The Court: Well, can't a regular employee do that?

Mr. Dunne: That is what I said to your Honor. A regular employee can because we have no slavery in any form in this country and an employee can leave his work at any time.

The Court: Is that any test then? [16]

Mr. Dunne: But if he is an employee and does that, he assumes responsibilities. He can be sued for damages. He owes obligations to his employer under the contract of employment.

The Court: There might be different consequences——

Mr. Dunne: That's right.

The Court: ——that would flow from a refusal to carry on as between a learner and an actual employee.

Mr. Dunne: That's right. I don't suggest that as a conclusive test. I don't have to, your Honor, because your Honor excluded this from evidence. I say it is a factual element that should have been before the jury.

The second thing, if your Honor please, is this, there may be some intimations, there may be some pretty broad language in one or two of the cases, but no case that I know—I would like to be corrected on this if I am wrong, but there is no case that I know of that has gone so far as to say that these observers are performing services for the employer when they observe and do nothing more. I think it is fair to say that in all of the cases——well——

The Court: Of course, in the Watkins case the man was doing something.

Mr. Dunne: And relieving another man of duty. Also in some of the cases it has been argued that if he were observing or doing something and the regular employee was there at the [17] same time, who would have done the work had the student not been there to do it, it has been argued therefore he is not performing any real service because he is conferring no benefit upon the employer, that if he weren't there doing that the regular employee would. The courts go along with—they said if you are doing it you are still performing service.

The Court: There is evidence here that he did do some service to the limited extent of having lighted a couple of fires.

Mr. Dunne: That's right.

The Court: Now it is true that he was not doing that service, was not engaged in that precise activity at the time of the accident, but need he be at any time if he were doing that?

Mr. Dunne: Doesn't it bear, though, on this, your Honor, doesn't it bear on what his status was at the time he was in the cab of this locomotive and isn't his understanding as expressed in this writing and his employer's understanding likewise as expressed in that writing; isn't that an element of fact; isn't that one of the facts that the jury should have had before it in passing on these very questions that your Honor and I are now discussing? Your Honor's ruling in the case was that it was not for you to pass upon them but it was for

the jury to pass upon them, and the result was that the jury passed upon them with one of the elements that showed what the [18] relationship was, because there are two sides to it—there must be the employee's side as well as the employer's side—that matter was submitted to them dropped out of it. The only expression of the employer's understanding of the relationship and the expression of it, at least to some extent that the employer was likely to rely on——

The Court: It may be that the Court should have—I don't know—it may be that the Court should have given some specific—more specific instruction to the jury as to whether or not at the time of the accident the plaintiff had substantially departed from his status and from the performance of his duties as a student fireman.

That appears to me is the really more important question in this case under the Watkins rule.

Mr. Dunne: Well, I am inclined to agree with you, but I think——

The Court: I think, as I said, realistically speaking on the basis of the evidence here it is pretty hard to get away from the fact that he was a student fireman, that he was there to learn how to be a fireman, and maybe his learning might have only consisted of observing, but the big question is whether or not, assuming the rule in the Watkins case to be correct, is there sufficient evidence in this case or not to point out that he was within that rule at the time of the accident.

Mr. Dunne: But those questions—— [19]

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Mr. Dunne: But those questions—— [19]

The Court: Because I submitted that to the Jury. It might be I should have given them more precise instructions, but that is a rather interesting question, I think, in this case.

Mr. Dunne: I'm sorry——

The Court: I don't think so much about the other questions as I do about that one.

Mr. Dunne: Except when they are submitted to the Jury—Your Honor's rulings in excluding some of this evidence, even some, would have submitted only part of the story to the Jury.

The Court: There wasn't anything excluded from the Jury in connection with the facts as to his activities at the time.

Mr. Dunne: No, not the physical facts.

The Court: What was excluded was this defendant's Exhibit A.

Mr. Dunne: Defendant's Exhibit A for identification and Rule 864. Those are the two things.

The Court: What is that Rule 864?

Mr. Dunne: That said unauthorized people cannot be on a locomotive except in discharge of their duties.

The Court: Oh, yes. Well, those two may be bound up in that question at least.

Mr. Dunne: In other words, what I am suggesting to Your [20] Honor is that this thing is a fagot. It is a fagot bound together. The whole thing must be looked at together to see what is its strength or weakness. You can't do it by taking a part and testing each one of the members one by one. What Your Honor did was to exclude some

of the members that would have reflected upon other things and would have given the Jury the whole picture.

The other thing I want to suggest to Your Honor, very briefly, is the question of damages. The question is most difficult and I know that Your Honor is extremely hesitant in disturbing findings of the Jury on the question of damages, even when Your Honor, had you been left to yourself and had been deciding the case, Your Honor might have rendered a judgment for a sum which was substantially less. But it seems to me that on the facts of this case \$50,000 is an amount—because Your Honor can deal with this both as a question of law and as a question of fact—is an amount which is completely out of line.

Now may I suggest just briefly these things in that regard. This man certainly is not an economic derelict. He is a comparatively young man. He is twenty-seven. He is young enough to learn a trade. He never had a trade. He didn't lose anything by this accident. He hadn't had some years of training in a particular trade which required him to use his legs and now has to give that up and go on to something else, but he is [21] young enough so that he can adjust himself and he can learn a trade. He is very far from an economic derelict.

Aside from the discomfort that will result to him, then if he is entitled to receive anything, he is entitled not to something that is going to take care of him for the rest of his life, but he is entitled to something that is going to make up to him in some

measure a handicap. As a matter of fact, if he acquired any one of a whole series of facilities in vocational training where he could do bench work and other work with his hands, the only thing that he need make up to him would be something to make up to him for some discomfiture which he is going to experience for the rest of his life. He could very well receive vocational training which would permit him to earn—as a dental laboratory technician—now I use that example, if Your Honor please, because that is what happened in the Thiel case which is a fairly well known case in this Court, and was tried here twice. That was the case of a man who had received a very severe injury to an arm. The first time we tried it the fracture had not united yet and he had lost both legs and that man had gone through a course of vocational rehabilitation and at the time we tried the Thiel case the second time he was making more money than he ever made in his life. So that this man isn't going to go through life not working. He is going to acquire a trade. He has the facility, the ability and the state will give him the [22] training to acquire the trade. The question is, in the light of those circumstances, what should be made up to him. He had been earning at one time, his testimony was, when he was in the Merchant Marine, \$300 a month. That was at a time when, with his original injury on the left leg, one which at that time certainly was duplicating, at least in the early stages, the injury which he received in jumping off this locomotive, the Government paid him a pension at \$75 a month. Of course that is a different kind

of a program, granted, but it does indicate something to help along what is a fair measure. After that he was earning—his highest earnings that he gave us was a little over \$190 a month. The record unfortunately cannot be made clear and isn't entirely clear as to what the effect of his injury on his left leg was having on him. It does appear, however, that he had never held any one job for any particular length of time.

Now, the factors were given and simply assuming that three per cent factor, the factor on a three per cent basis, which is 23.11, if he was given half of what he was earning just before this accident as something to help him along because of a handicap, that would come to \$1200 a year and that would come to \$27,732 total. Perhaps that needs some adjustment. Perhaps it should be adjusted upward or downward. Perhaps the handicap isn't that severe. Also I am willing to assume that for a year or perhaps two years there will be a [23] period of further rehabilitation and a period of training that couldn't be counted on. But certainly he will at the end of two years—at the end of two years that young man is going to be doing something, some work. He is going to be doing remunerative work. He is going to be earning as much as he was earning at the time he started in being a student fireman. He is going to be earning \$200 a month. To go to matters which are general knowledge for all of us, the easy work of being an elevator operator pays better than \$225 a month. I don't know really of any substantial full-time job, certainly around

the city, that pays less than that, and it is in view of those circumstances that I am suggesting to Your Honor that \$50,000 is entirely too high to be fair compensation.

What obviously happened with this Jury, whether they did it consciously or unconsciously, they looked at this man as a single man who was before them, and in his physical condition, and said to themselves, what are we going to do to take care of this man and, in spite of Your Honor's very clear instructions on the subject, overlooked the fact that his present physical condition and his present handicaps are not entirely due to the injury in the roundhouse but in very large measure are due to the injuries received during the war. The curious thing about that is that the injuries are almost identical, both in the original injury and in the way they repaired themselves, with the exception that the injury to the left leg did [24] not cause a shortening. The injury to the right leg caused a one inch shortening.

The Court: The injury that he got in the accident, of course, was proved to be far more disabling than the other injury he got in the army.

Mr. Dunne: That was because it has given him that limp. It is principally because of that one inch shortening.

The Court: He has got a bad leg there. It is a bad injury. There is no doubt about that. And if—you say it is very difficult to distinguish on the facts some of these matters—if the verdict is more—I said this several times in several of these cases—

it is more than I would have given, but then again I may not be right about that. While it is not the equivalent of having no leg at all, what he has, though, is a pretty bad injury. It is a pretty permanent injury, and I don't know if there is enough in this case to warrant exercising discretion in favor of remittitur. If the damages were to be revaluated, they ought to be revaluated rather than cut down, because it is not an easy—it is not an easy damage case in that respect.

Mr. Dunne: It has been a very difficult one for me, if Your Honor please.

The Court: It is difficult to disassociate the elements in special circumstances of this case, the elements that are proper for consideration, without taking into account some [25] inter-related circumstances. I think the railroad company and the plaintiffs in any of these cases do a better job of it when they do it themselves rather than when they go to Court. I mean, looking at it abstractly and objectively as to what is a just result, I think some of these cases, like all damage cases, are very difficult to evaluate. This is a particularly difficult one.

Mr. Dunne: It occurred to me I might argue this to Your Honor. While this Jury has given him fifty thousand dollars for one leg, in the light of the fact that he has two bad legs, would they have awarded him a \$100,000 for two bad legs? If they had, certainly that would have been way out of line in view of what lies ahead in the future for this young man. And yet I felt that is not an entirely fair argument to make because I think the injury

to the right leg is as severe as the injury to the left. Then we had the testimony of Dr. Guterman, who put it this way, that he was not particularly optimistic. He testified from a medical point of view that he didn't see very much in the way of improvement lying ahead for this young man. Yet in view of the history of the other leg, while perhaps medically there may be no improvement—in the medical condition—I can't believe that this young man will be better adjusted to his unfortunate condition in two years than he is now.

The Court: Well, of course—— [26]

Mr. Dunne: And it is those——

The Court: That's somewhat speculative, though. That phase of it, it is hard for you or me to come to a satisfactory conclusion.

Mr. Dunne: It's hard for anybody.

The Court: We have to go on the evidence which we have and it is difficult to appraise that evidence.

Mr. Dunne: Well, on the basis of past experience I am urging this upon Your Honor, because I wanted Your Honor's judgment, and in making the motion on that ground I felt, as Your Honor has expressed from the bench, that this result is higher than Your Honor would have awarded had the awarding of damages been put in Your Honor's hands. The question that remains for Your Honor is the question of exercise of discretion, whether remittitur should be ordered as condition for denial of new trial or whether there should be a new trial.

Unless there is something that Your Honor wishes me to look up and further present, I am prepared

to submit the matter because I have not been able to find anything that is really precise on it and I think Your Honor is thoroughly familiar with the general principles which apply.

The Court: You are reading from some transcript there, Mr. Dunne. Is that a complete transcript of the case?

Mr. Dunne: No, it is not. It is a transcript of only the first two days and does not have the testimony of the doctors. [27]

The Court: You mean on the damage question?

Mr. Dunne: On the fraud question.

The Court: On the fraud question.

Mr. Dunne: Yes. Otherwise it is complete.

The Court: Have you a copy of that?

Mr. Ryan: No, Your Honor.

Mr. Dunne: Do you want me to leave it with Your Honor?

The Court: The thing I would like to review is the testimony as to the happening of the accident, the circumstances involved. That is in there?

Mr. Dunne: That is in there.

The Court: Just what he was doing, the testimony with respect to the activities of the plaintiff as a student fireman, that is what I am particularly interested in. Is that in there?

Mr. Dunne: Yes.

The Court: Have you any marks in there that I shouldn't see?

Mr. Dunne: No, none.

The Court: Will you be good enough to leave that? I will return it to you.

Mr. Dunne: So that Your Honor will understand, here's the course that it took. The plaintiff completed his testimony the afternoon of the second day. We then made a motion for non-suit. Your Honor denied that. Then as long as the Jury [28] was out and Your Honor had indicated some questions on the evidence, I then made my offers of proof at that time in the absence of the Jury, and Your Honor ruled on them. So that when we came back the morning of the third day the only testimony taken was the testimony of the doctor who had examined this man and testified on the fraud issue and the matter was then argued and submitted.

The Court: All right, Mr. Ryan.

Mr. Ryan: May it please Your Honor, addressing myself to the question that Your Honor thought the uppermost question of deviation from employment, and the question of Your Honor not giving defense Instruction 22 or 23 or the substance of them. Your Honor stated at the time that Mr. Dunne made his exceptions to the failure to give those two Instructions that you read the case of Chesapeake & Ohio Railroad Company vs. Harmons Administrator, from Kentucky, and you had no quarrel with the law as expressed in that case, but, you stated at that time, you did not believe that the evidence in this case showed any deviation and that there was no question of any substantiality to go to the Jury on that point. I believe from the entire evidence in this case that Your Honor was entirely correct at that time. There was practically no con-

flict all the way through. The Southern Pacific Company called only one witness, and that was the doctor on the fraud issue. They did not contest the seriousness of the injury. They didn't [29] produce any medical testimony, and although—I won't say they had the man—the man was available, the foreman, if there were any wrong statements or incorrect statements made by the plaintiff as to what was the scope of the authority given to him to go into that roundhouse and what he was to do there, the foreman was available, Mr. Tim Ferrell.

All right. Now, so all we have on that is the testimony of the plaintiff, not Peterson, as I will call to Your Honor's attention in a moment. The plaintiff in this case, Mr. Libbey, said that he was given authority to go into that roundhouse when he went to get his job and he was supposed to present this authority to the roundhouse foreman. The authority, which is in evidence—I have a copy of it here—stated this:

“Authority to pass and instruct student.

“Please see that Libbey, student fireman, is thoroughly instructed”——

Not partially instructed, but

“thoroughly instructed in the duties of the position named”——

in the duties of firemen——

“and impress upon him the importance of thoroughly acquainting himself not only with the duties of that position but of any other

with which he may be entrusted or to which he may aspire.”

The evidence showed that at Roseville the duties of hostler were conducted by firemen. In other words, all hostlers were [30] firemen of the company. Part of the duties of hostlers were taking engines out of the roundhouse and spotting them in various tracks.

In addition to that he presented that to the roundhouse foreman. Now, here are the instructions the roundhouse foreman gave him. He said, “I want you to go around with these two Mexican boys who are firelighters and learn how to light fires. In addition to that I want you to keep your eyes and ears open and learn everything you can about being a fireman.”

That was pretty broad. No contradiction, no narrowing of it, no instructions whatsoever that he was not to go on a moving locomotive, none whatever, but this was very broad charter of authority that was given to him. All right. With this broad charter given to him he worked for two days. The first day he did nothing but observe firelighting. The second day, from what he had learned by observation, he lit two fires on two locomotives. He prepared two locomotives. And, on the question of whether he performed any service for the company, he lit fires on one locomotive, which was an empty Mallet, that was going from Roseville, California, to Sparks, Nevada, and the other one was a local at the Bowman turn, I think they call it, and he lit the fire on that one. All right. Now, at the end of

the second day the firelighters said, "We have lit all the fires. There are no more locomotives to fire up. We are going to go." [31]

So he was standing around with nothing else to do when he met his friend or acquaintance Petersen, who was a hostler, and he asked him, "What are you doing here?" He said, "Oh, I'm a student fireman." Petersen said, "Oh, you are. I am going to take this locomotive out and spot it on one of the tracks. Do you want to come along?" And he said, "Yes," and he got in and he got in for the purpose of learning under this broad charter that he had received, both in writing and from the oral instructions of the roundhouse foreman, to learn everything he could about being a fireman. One of the things he had to learn about being a fireman was how to take an engine out of the roundhouse as a hostler and spot it and also to observe how an engine should be operated, and he was doing that when he got hurt.

The only other testimony on this point is the testimony of Petersen himself. Petersen testified substantially as I have just said, that he met Libbey, whom he knew from around the town of Roseville, and he found out he was a student fireman, and he said, "I am going to take this engine out. Come along if you want." All right. Then on cross-examination Mr. Dunne asked him if he ever had anything to do or any experience with student firemen. He said, "Yes, I have seen student firemen around there. In fact, I have had them out on the run with me around the yards when they were

learning their work. Then Mr. Dunne put this leading question to him, which he had a [32] right to because he was cross-examining him, "Have you any jurisdiction over student firemen in the round-house?" He said, "No, I have no jurisdiction over them whatever." That meant, the word jurisdiction—but the point is this, to show that Your Honor was correct in saying there was no evidence of deviation which Your Honor could give to this Jury so that Rules 22 and 23 could be applicable, there was no testimony that he was forbidden to go on an engine, and the testimony of Petersen that he had no jurisdiction over student firemen is not any testimony or showing that there was any deviation from the written instructions or the oral instructions that plaintiff had received.

One other point. Your Honor expressed some doubt on this proposition, under the Watkins case whether or not—and Mr. Dunne said he had no cases on this point—whether or not you have to show that the student fireman is actually physically performing some service for the railroad at the instance of his injury. I say you don't have to show that because the Watkins case is one itself where he wasn't doing anything at the moment of injury. In the Watkins case Your Honor will remember——

The Court: That's right. He already checked the car and he was walking away when he was injured.

Mr. Ryan: That is what I have in mind. He was hired as a clerk and he had finished going down

one side of the cars and [33] the other was working on the other and they finished that job and they for their own amusement, for their own benefit, went to some coffee shack to get some coffee and they finished their coffee and they were just walking across the tracks when the clerk went between the cars and the student saw the clerk do that so he went between the cars and they were started up and he was injured. So he wasn't doing anything at that time.

In addition to that there are other cases on that where the people weren't doing anything, the student, I mean, wasn't doing any work for the company at the time of the accident.

The Rule is this, was he under the control of the railroad, and, of course, there I don't think there is any question about that, that he was. And then performing services, did his job as a student fireman require him to perform services? Well, that was submitted to the Jury that way in this case and there was the undisputed evidence that he did do actual service for the company in lighting these fires.

In addition to the case that Mr. Dunne cited, Chesapeake & Ohio against Harmons Administrator, a Kentucky case, we have cases like this, and here is a case of Huntsicker vs. Illinois Central, 129 Fed. 548, from the Sixth Circuit in 1904. That was a case of a student flagman who at the time of the accident was making a trip, and he did some flagging during the day but at the time of the accident he was killed in the caboose [34] while

sleeping, and he wasn't doing any service at the time of the accident. Then we have the case of *Brown vs. The Chicago Northwestern*, 286 Southwestern 45. A student fireman, just like in this case, at the end of the run was walking to the yard office and washroom and was killed by a train on the other track. It was held that he came under the Federal Employers Liability Act, that he was an employee because during the day he as a student fireman was merely observing; he didn't operate the engine; he sat in there and was just observing. So I think that there is plenty of evidence that he was an employee.

Just a word now on the question of fraud.

The Court: I don't think you need to argue that.

Mr. Ryan: On damages I think it was a question for the Jury. Your Honor will recall that I used this figure on the board. He earned \$300 a month while he was in the Army Transport Service and there was some record of his past earnings, some record of his earning capacity. So giving the figure, whatever the three per cent was, it came out to \$82,800. The Jury brought in a verdict of \$50,000. I make this argument on that point: Supposing the Jury took the lowest figure that you had, which would be the \$190 a month that he earned while working as an airplane mechanic at McClellan Field, and if you took that alone that would come to more than this \$50,000; or if you even follow Mr. Dunne's suggestion and say that the Jury said, "Why, certainly, which is obvious, there was [35]

some reduction in his earning capacity; bear in mind before he had this accident his earnings weren't too much. So Mr. Dunne would have him making more money as an elevator operator than he earned before the accident when he was in pretty good health, when he could walk seven miles a day, and could work with a pick and shovel. But suppose they say his earnings were cut down, in half. If you say that his potential earnings would be \$300 a month and today, on account of his injuries, he could earn half of that, \$150 a month, that \$1800 a year, and you take the three per cent figure for his life expectancy, that would come out to \$41,400 under the method that Mr. Dunne suggests, which would leave only \$8600 for pain, suffering and disability, bearing in mind that the undisputed evidence of Dr. Gueterman is that this boy will have pain the rest of his life, that the only way you can eliminate pain would be to fuse his knee and make it solid. Because he has two bad legs, he wouldn't do it, he wouldn't recommend that. So he is condemned to pain for a long life expectancy, and that would only be \$8600—a very conservative amount to reach, this figure of \$50,000. And the rule has been stated many times in this Court, as Your Honor did, as your Honor cited in the Guntrey case—you cited *Jones vs. The Atlantic Refining Corporation*, when the Court said:

“When there is any margin for reasonable difference of opinion in the matter of damages the view of the Court should be held to the [36] verdict of the Jury rather than the contrary,”

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“When there is any margin for reasonable difference of opinion in the matter of damages the view of the Court should be held to the [36] verdict of the Jury rather than the contrary,”

especially in a case of this sort where it is conceded that it is a serious injury, it is a permanent injury, and there is no question about it, it is uncontradicted. So I am willing to submit the matter as it is.

The Court: I will go over this matter. I have the transcript and my own notes, and we will mark and consider the matter submitted.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 37 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ [Indistinguishable.]

[Endorsed]: Filed August 29, 1951. [37]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint for damages.

Answer.

Demand for jury trial.

Motion for order permitting defendant to amend answer, etc., filed May 15, 1951.

Affidavit of R. Mitchell S. Boyd, filed May 15, 1951.

Affidavit of Daniel V. Ryan, filed May 29, 1951.

Denial of motion for order permitting amendment to Answer to complaint, without prejudice.

Motion for order permitting defendant to amend answer, etc., filed June 20, 1951.

Affidavit of R. Mitchell S. Boyd, filed June 20, 1951.

Amendment to answer.

Plaintiff's proposed instructions to the jury.

Defendant's proposed instructions to the jury.

Additional instruction given in response to the inquiry of the jury.

Verdict.

Judgment on verdict.

Notice of motion for new trial.

Order denying motion for new trial.

Notice of appeal.

Order denying motion for judgment notwithstanding verdict.

Supplemental notice of appeal.

Supersedeas bond.

Stipulation re supersedeas bond.

Designation of record on appeal.

Four volumes of reporter's transcript.

Plaintiff's Exhibits 1 to 13, inclusive.

Defendant's Exhibits A to C, inclusive.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 30th day of August, 1951.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 13078. United States Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Roger N. Libbey, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed August 30, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13078

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Appellant,

vs.

ROGER N. LIBBEY,

Appellee.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Agreeably to Rule 19, paragraph 6, of the Rules of the above Court, Appellant Southern Pacific Company, a corporation, makes its statement of points on which it intends to rely and its designation of record as follows:

I.

Statement of Points

The points upon which appellant intends to rely are as follows:

1. The evidence is insufficient to sustain the verdict and judgment, and on that ground the trial court erred in denying the motion of appellant (defendant below) to dismiss the cause at the close of the plaintiff's case and in denying the motion of appellant (defendant below) that the jury be directed to render a verdict in favor of defendant

and appellant and, accordingly, the court erred in denying appellant's motion for judgment notwithstanding the verdict.

2. In amplification of the foregoing and as further statement:

(a) The action was brought under the Federal Employers' Liability Act and said Act had no application in that plaintiff (appellee here) was not an employee of defendant (appellant here).

(b) This was an action under the Federal Employers' Liability Act and there is no evidence that the plaintiff (appellee here) was engaged in interstate commerce within the meaning of that Act, or that any part of any duty of plaintiff was in furtherance of interstate or foreign commerce or in any way or directly or closely or substantially affected such commerce.

(c) At the time plaintiff (appellee here) was injured he had departed from the course of any assumed employment with defendant (appellant here) and was not acting in the course or scope of any assumed employment or for or on behalf of any assumed employer and had departed from directions given to him as to what he should do on or about the premises and equipment of defendant and was acting solely in his own interest and for his own benefit.

(d) Any assumed employment of plaintiff.

(appellee here) by defendant (appellant here) was procured by the fraud of the plaintiff in a respect material to entering into any employment relationship and plaintiff falsely represented to defendant that he had not received any injury and was not suffering from any physical disability, and that said representation was false and was known to the plaintiff to be false at the time he made the same, that defendant was ignorant of the falsity of said representation and relied thereon in permitting plaintiff to act as a student fireman, that plaintiff intended defendant should so rely on said representation, that had defendant known the truth defendant would not have employed plaintiff and plaintiff's said fraud had causal relation to the injury for which plaintiff sued.

3. The court erred in denying instructions proposed by defendant (appellant here) as more particularly appears from the objections and exceptions taken to the charge and the refusal of the court to instruct as requested by appellant, all as appears in the transcript of record herein and particularly the court erred in denying defendant's proposed instructions numbers 22 and 23, and erred in refusing to submit to the jury for determination by it the issue whether, assuming plaintiff was an employee of defendant, plaintiff had so far departed from the course and scope of his employment as to be outside of any assumed status of employee and so that the Federal Employers' Liability Act was not applicable.

4. The court erred in excluding evidence offered by defendant (appellant here) and in particular erred in excluding evidence as follows:

(a) Defendant-appellant's Operating Rule No. 864;

(b) Section 16 of Article 51 of the Firemen's Agreement (reporter's typewritten record, p. 224);

(c) Defendant's Exhibit A for identification both as to the whole and as to the separate and distinct offering of the heading and the first paragraph except the last word, the last two lines and the signature;

(d) Evidence by Dr. Walter William Cress, examining physician of defendant, who examined plaintiff prior to the time that plaintiff went on defendant's premises as a student fireman to the effect that had the doctor known of plaintiff's physical condition he would not have accepted him for service or for employment by defendant and that plaintiff's physical condition did not meet the standards for employment set by defendant.

5. The verdict is excessive, as to the amount is unsupported by the evidence as matter of law, was given under the influence of passion and prejudice, and as to amount is excessive.

6. The trial court erred, and was guilty of an abuse of discretion, in denying defendant's motion for a new trial upon the ground that the verdict

was excessive and/or, if the same were to be denied, in not denying it conditioned only on a remittitur.

II.

Designation

Appellant hereby designates as all of the record which is material to the consideration of this appeal, and designates for printing, the whole of the certified record on appeal, including exhibits appropriate for reproduction when required to be printed by the Rules of this Court when designated, excepting only the following:

(a) Plaintiff's proposed instructions;

(b) Defendant's proposed instructions except instructions numbers 22 and 23, and these should be reproduced and printed.

Dated September 4, 1951.

/s/ ARTHUR B. DUNNE,
DUNNE, DUNNE & PHELPS,
Attorneys for Appellant,
Southern Pacific Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 5, 1951.

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